119-185

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1885.

No. ~~274.~~ 36

MARY E. FREEMAN, D. C. FREEMAN, J. B. PUCKETT, WILLIAM MOORE, AND WILLIAM J. G. McILHENNY, PLAINTIFFS IN ERROR,

vs.

BENJAMIN ALDERSON; AMELIA ALDERSON; MALINDA JOHNS AND HUSBAND ROBERT JOHNS; ALICE GRIMES AND HUSBAND B. GRIMES; JAMES ALDERSON AND W. TALTON ALDERSON, MINORS, BY THEIR NEXT FRIEND R. H. SHELTON; MARY JOHNS AND HUSBAND ROBERT JOHNS, JR.; ADELINE EMMINEZER AND HUSBAND WILLIAM EMMINEZER; GIBSON ALDERSON AND JOHN ALDERSON.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF TEXAS.

FILED SEPTEMBER 7, 1883.

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vs.

BENJAMIN ALDERSON; AMELIA ALDERSON; MALINDA JOHNS AND HUSBAND ROBERT JOHNS; ALICE GRIMES AND HUSBAND B. GRIMES; JAMES ALDERSON AND W. TALTON ALDERSON, MINORS, BY THEIR NEXT FRIEND R. H. SHELTON; MARY JOHNS AND HUSBAND ROBERT JOHNS, JR.; ADELINE EMMINEZER AND HUSBAND WILLIAM EMMINEZER; GIBSON ALDERSON AND JOHN ALDERSON.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF TEXAS.

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1–4 *3d Amended Original Petition.*

The United States circuit court 5th circuit in and for the northern district of Texas, held at Waco, for the April term, A. D. 1883—Hon. A. P. McCormick, district judge, presiding—among other the following proceedings were had.

UNITED STATES OF AMERICA:

Circuit Court of the United States, 5th Circuit, in and for the Northern District of Texas, at Waco sitting.

Hon. A. P. McCormick, dist. judge.

Be it remembered that on the 2d day of February, A. D. 1881, that the plaintiffs, Benjamin Alderson and others, filed their petition in action of tresspass to try title against D. C. Freeman and others, caused numbered 39 and styled Benjamin Alderson *et al. vs.* D. C. Freeman *et al.*

5 The following 3d amended original petition was filed Octo. 5th, 1882, and endorsed to wit.

Third Original Amended Petition.

UNITED STATES OF AMERICA:

U. S. Circuit Court for Northern District of Texas.

BENJAMIN ALDERSON *et al.*
vs.
D. C. FREEMAN *et al.*.
} No. 39.

3d amended original petition.

This action is brought as well to try title as for damages.

E. H. GRAHAM,
Att'y for Pl'ffs.

Filed Octo. 5, 1882.

J. H. FINKS, *Clerk.*

Which is in words to wit:

Suit pending in U. S. circuit court, northern district of Texas, at Waco, Texas.

BENJAMIN ALDERSON *et al.*
vs.
D. C. FREEMAN *et al.*
} No. 39.

Now come the plaintiffs in the above-entitled cause with leave of the court and amend their second amended original petition filed herein on the 22d day of April, 1882, by filing the following as their 3d amended original petition:

UNITED STATES OF AMERICA,
State of Texas, Northern District of Texas:

In the Circuit Court of the United States for the Northern District of Texas, sitting at Waco, Texas.

To the honorable the judges of said court:

The petition of Benjamin Alderson, Amelia Alderson, Malinda Johns, joined by her husband, Robert Johns; Alice Grimes, joined by her husband, B. Grimes; James Alderson and W. Talton Alderson, who are minors, and sue by their next friend, R. H. Shelton; Mary Johns, joined by her husband, Rob't Johns, Jr.; Adeline Eminizer joined by her husband, Wm. Eminizer; Gibson Alderson and John Alderson, who will hereinafter be styled the petitioners, show unto your honors that all of your petitioners are now and were at the time of the institution of this suit citizens of the State of Kentucky. That your petitioners, Benjamin Alderson, Mary Johns, and Robert Johns, Jr., reside in the county of Logan, in said State; that your petitioners, Amelia Alderson, Malinda Johns, Robert Johns, her husband; and John Alderson, and R. H. Shelton, reside in the county of Warren, in said State. That your petitioners, Adeline Eminizer, William Eminizer, and Gibson Alderson reside in the county of Ballard, in said State; that your petitioners, Alice Grimes and B. Grimes, resided at the time of the institution of
7 this suit in the said county of Warren, but now reside in the county of Butler, in said State; that your petitioners, James Alderson & W. Talton Alderson, resided at the time of the institution of this suit in the said county of Warren, but now reside in the county of McLean, in said State. Your petitioners bring this their suit against Mary E. Freeman, D. C. Freeman, Rosa Freeman, J. B. Puckett, G. N. Morrison, William Moore, and William J. G. McIlhenny, who are now and were at the time of the institution of this suit citizens of the State of Texas, and of whom the said Mary E., D. C., and Rosa Freeman reside in the county of Travis, in the State of Texas, and the said Puckett, Morrison, & Moore in the county of McLennan, in the State of Texas, and the said McIlhenny in the county of Coryell, in the State of Texas.

And your petitioners show that on the first day of Jan'y, 1879, your petitioners were lawfully seized in fee, were the legal owners of by fee-simple title, and entitled to the possession of the following-described tracts of land lying and being in said State of Texas, and situated in the county of McLennan and in said northern district of Texas, and more particularly described as follows, to wit: All
8 of that part of the survey of land in the western part of McLennan county, patented to Henry Alderson by the State of Texas, by patent dated on or about July the 16th, A. D. 1855, described as follows, to wit: Beginning at the southeast corner of said Alderson survey, which corner is the southwest corner of the survey, of 5,892,034 sq'r varas, patented to the heirs of B. C. Wallace, dec'd, by patent dated November 5, 1872, for the southeast corner of this survey, and running thence north 30° W. with the east line of said

Alderson survey and west line of said Wallace 1,608 varas to a stake for corner; thence south 60° west 1,950 varas, more or less, to the east line of the J. R. Nelson survey; thence 19° west, with the line of said Nelson survey, to the southeast corner of said Nelson survey, on the north line of the Francis Ramsdale survey; thence in a southerly direction with the lines of the said Francis Ramsdale survey to the point on the same, which is south 60° west from the said beginning corner; thence N. 60° E. 2,420 varas, more or less, with the south line of the Alderson survey to the said beginning corner. The land above described being the south ½ of said Alderson survey.

And your petitioners further represent that, being so seized, owning and being entitled to the possession of said tract of land
9 as aforesaid, afterwards on the said first day of January, 1879, the said defendants unlawfully entered upon and dispossed petitioners of the said premises with force and arms, ousting and ejecting petitioners therefrom, and from that day to this have been trespassing upon the same, treading down the grass, digging up the dirt, cutting down the timber, setting up a pretended claim of title to the same, and slandering the title of petitioners, and ever since said date, and now, withholds the possession of said land from petitioners, who are now the rightful owners of the same.

Your petitioners further show that the said land is of the value of six thousand dollars, and that your petitioners, Benjamin Alderson, Amelia Alderson, and Malinda Johns, own each an undivided one-fifth interest in said tract of land.

Your petitioners, Alice Grimes, James Alderson, and W. Tarleton Alderson, own each an undivided one-fifteenth interest in the same, and your petitioners, Mary Johns, Adeline Eminizer, Gibson Alderson, and John Alderson, own each an undivided one-twentieth interest in the same, making the whole.

The premises considered, petitioners pray for a judgment against the said defendants, who have already been cited for the res-
10 titution of said premises, for a writ of possession for the same, for their costs of suit, and as in duty bound will ever pray, etc.

E. H. GRAHAM,
Att'y for Petitioners.

11 *Second Original Answer of Defendants.*

Process issued to the several defendants, and on the 16th day of April, 1883, the following second amended answer of defendants was filed.

Endorsed, to wit: No. 39. Benjamin Alderson *et als. vs.* D. C. Freeman *et als.* 2d amended original answer of defendants. Filed April 16, 1883. J. H. Finks, clerk; which is in words as follows, to wit:

12 In U. S. Circuit Court for Northern District of Texas, at Waco, April Term, 1883.

BENJ. ALDERSON *et als.*
vs.
D. C. FREEMAN *et als.*
No. 39.

Now come defendants, Mary E. Freeman, D. C. Freeman, Rosa Freeman, J. B. Puckett, G. N. Morrison, William Moore, and William J. G. McIlhenny, and amending their first amended original answer filed herein October 14, 1882, leave of the court had for amendment, and, in lieu thereof, say:

1st. Defendants, Rosa Freeman and G. N. Morrison, have no right, title, or interest of, in, or to the land described in plaintiffs' petition, nor do they claim any right, title, or interest therein, but they disclaim any and all right, title, and interest thereto or therein, or in any part thereof, and they pray the judgment of the court for their costs, and that they go hence without day.

2d. The said defendant, D. C. Freeman, as vendor and warrantor of his other codefendants, defending for himself and for them,
13 says that plaintiffs' petition is insufficient in law, and shows no cause of action, and of this he prays the judgment of the court.

3d. He further says that neither he nor his said other codefendants are guilty of the wrongs, injuries, and trespasses, or of any of them, as complained of by plaintiffs.

4th. He denies all and singular the allegations, averments, and representations in said plaintiffs' petition contained, and especially denies that he or his said codefendants, for whom he answers and defends, are in possession of the land claimed by plaintiffs, or of any part thereof, and prays that plaintiff be held to strict proof.

5th. He says that if any part of the land held and claimed by him and his said codefendants is embraced in the land described in plaintiffs' petition, which is not admitted, but denied, he and they have had and held the actual, peaceable, continuous, and ad-
14 verse possession thereof under a regular chain of transfer from and under the sovereignty of the soil for more than three years next before the institution of this suit, and that cause of action, if any the plaintiffs ever had, which is denied, accrued more than three years next before the filing of the original petition herein, wherefore he says that plaintiffs are barred and forever precluded by the three years' statute of limitation of the State of Texas.

6th. He further says that if any part of the land held and claimed by him and his said codefendants is embraced in the land described in plaintiffs' petition, which is not admitted, but denied, he and they have had and held the actual, peaceable, adverse, and uninterrupted possession thereof, cultivating, using, and enjoying the same, and paying all taxes thereon, and claiming under deeds duly registered in the deed records of McLennan co., Texas, for more than five years next before the institution of this action by plaintiffs, wherefore he says that plaintiffs are barred and forever precluded by the statute of limitation of five years of the State of Texas.

15 7th. And, further answering, said defendant Freeman says, for himself, that he owns and holds the south half of the Henry Alderson ⅓ league under a purchase from one J. E. Head, and by deed duly executed and delivered on the 21st day of September, A. D. 1859, for a valuable consideration paid to the said Head; that by letter dated October 6, 1859, this defendant informed the said Henry Alderson that said tract of land had been sold under an execution for the costs which had been adjudged against him in the partition of the ⅓d league of land between him and this defendant, and that while it had been the purpose of defendant to purchase said south half for the benefit of said Alderson upon his paying the amount of said costs, that the sale of south half was made and the land was purchased by Head without defendant's knowledge, and that defendant had been required to pay said Head the sum of one hundred and eighty-one dollars to obtain a conveyance
16 from him of said south half; that defendant had paid the taxes on said land, amounting to the sum of forty dollars, and other expenses incident to the partition of the land; and this defendant thereupon informed the said Henry Alderson that he would hold said land for his benefit up to the first day of January, 1860, and that, upon the payment by said Alderson of the sum of $250 to this defendant, he would make conveyance of said land to him. This defendant further alleges that he was paid all the taxes, both State and county, on said land from the date of the purchase from said Heard up to the present time, amounting to the sum of two hundred and fifty dollars. Defendant further says that the said Henry Alderson was fully advised and informed of all the facts as above stated, and that unless he reimbursed this defendant the amount which he had paid out and expended in and about said land in the purchase thereof from the said Head, and the payment of the taxes thereon, on or before the first day of January, 1860,
17 that thereafter this defendant would hold and retain said land as his own and for himself. Defendant alleges that the said Alderson failed and neglected to pay this defendant said money, or any part thereof, on or before said first day of January, 1860, and has never since said date paid or offered to pay this defendant said money or any part thereof.

Whereupon defendant Freeman says that if the said plaintiffs are entitled to recover the land claimed by them in right of the said Henry Alderson, which is not admitted, but denied, then he says that said plaintiffs should be required to pay him the several sums of money which he has paid, laid out, and expended for and on account of said land, including taxes, together with interest thereon from the date of said payments, respectively. Said amounts of money so paid, laid out, and expended and more particularly shown with interest thereon in an itemized account which is hereto attached marked "Exhibit A" and made a part hereof. The premises
18 considered said def't Freeman prays for judgment against plaintiff for said south half of the Henry Alderson ⅓ league of land, and if it should be held that he is not entitled to recover the same, then he prays for judgment for the aggregate am't of said itemized

ac't, and that the same be held and established as a lien upon said land, and the same be ordered to be sold in default of payment and the proceeds of sale be applied to the satisfaction of such judgment, interest thereon, and costs.

He further prays for general relief.

HERRING, KELLEY & WILLIAMS,
Att'ys for Defendants.

"EXHIBIT A."

Amounts paid out for and demanded of H. Alderson.

Jan. 1, 1860.	Am't up to Jan. 1, 1860	$250 00
	Int. 23 years 3 months, to April 1st, '83	465 00
M'ch 1, 1860.	Taxes for 1859, paid March 1st, 1860	5 00
	Int on same 23 years 1 month	9 23
M'ch 1, 1861.	Tax for 1860, paid M'ch 1st, 1861	5 00
	Int. on same 22 years 1 month	8 83
M'ch 1, 1862.	Tax for 1861, paid March 1, 1862	5 00
	Int. on same 21 yrs. 1 month	8 43
M'ch 1, 1863.	Tax for 1862, paid March 1, 1863	5 00
	Int. on same 20 yrs. 1 month	8 03
M'ch 1, 1864.	Tax for 1863, paid M'ch 1st, 1864	5 00
	Int. for 19 years 1 month	7 63
M'ch 1, 1865.	Tax for 1864, paid M'ch 1st, 1865	5 00
	Int. for 18 yrs. 1 month	7 23
19		
M'ch 1, 1866.	Tax for 1865, paid M'ch 1st, 1866	5 00
	Int. 17 yrs. 1 month	6 83
M'ch 1, 1867.	Tax for 1866, paid March 1st, 1867	6 19
	Int. for 16 years 1 month	7 96
M'ch 1, 1868.	Tax for 1867, paid M'ch, 1868	6 19
	Int. for 15 yrs. 1 mo.	7 47
M'ch 1, 1869.	Tax for 1868, paid M'ch 1st, 1869	6 19
	Int. for 14 yrs. 1 month	7 00
M'ch 1, 1870.	Tax for 1869, paid Mc'h 1, 1870	6 19
	R. R. tax for 1869, paid March 1, 1870	22 14
	Int. for 13 yrs. 1 mo.	29 65
M'ch 1, 1871.	Tax for 1870 & convention tax, paid Mar. 1, '71	7 66
	Int. for 12 yrs. 1 mo.	7 40
M'ch 1, 1872.	Tax for 1871, paid M'ch, 1872	17 71
	Int. for 11 yrs. 1 mo.	15 58
Mar. 1, 1873.	Tax for 1872, paid M'ch, 1873	7 38
	Int. for 10 yrs. 1 mo.	6 00
M'ch 1, 1874.	Tax for 1873, paid 1st M'ch, 1874	7 38
	Tax for 9 yrs. 1 month	5 35
	Am't	$979 65

	Am't bro't forward	979 65
M'ch 1, 1875.	Tax for 1874, paid M'ch 1, 1875	7 38
	Int. for 8 yrs. 1 month	4 75
M'ch 1, 1876.	Tax for 1875, paid M'ch 1st, 1876	5 53
	Int. for 7 yrs. & 1 month	3 10
M'ch 1, 1877.	Tax for 1876, paid M'ch 1st, 1877	5 53
	Int. for 6 yrs. & 1 month	2 64
M'ch 1, 1878.	Tax for 1877, paid M'ch 1, 1878	5 53
	Int for 5 yrs. 1 month	2 20
M'ch 1, 1879.	Tax for 1878, paid M'ch 1, 1879	5 53
	Int. for 4 yrs. 1 month	1 80
M'ch 1, 1880.	Tax for 1879, paid M'ch 1, 1880	5 53
20		
	Int. for 3 yrs. 1 month	1 35
M'ch 1, 1881.	Tax for 1880, paid M'ch 1, 1881	4 79
	Int. for 2 yrs. 1 month	77
M'ch 1, 1882.	Tax for 1881, paid M'ch 1, 1882	3 00
	Int. 1 yrs. 1 month	25
	Amount	$1,039 33

Answer of J. B. Puckett.

The following answer of J. B. Puckett was filed April 4th, 1883, indorsed, to wit: No. 39. Benj. Alderson *et al. vs.* D. C. Freeman *et al.* First amended answer for J. B. Puckett. Filed April 4, 1883. J. H. Finks, clerk.

Which is, to wit:

In U. S. Circuit Court, Northern District of Texas. April Term, 1883.

BENJ. ALDERSON *et al.*
vs.
D. C. FREEMAN *et al.* } No. 39.

Now comes J. B. Puckett, one of the def'ts in the above-
21 styled cause, and after leave of the court had and obtained, and amending his answer herein, heretofore filed April 25, 1882, and in lieu of and as a substitute thereof, says, first:

That he is not guilty of the trespasses, wrongs, and injuries, or any of them, as complained of by said plaintiffs.

Second. He denies all and singular the obligations and averments in plaintiffs' partition and amended petition.

Third. He says, if it be true that he holds any of the land sued for, *he says* that he purchased the same for a valuable consideration, and has paid the same as in the deed thereto expressed, on the 25th day of August, 1877, and received a warranty deed from his co-defendants, to wit, D. C. Freeman, Mary E. Freeman, and Rose Freeman, joined by Lizzie Freeman and John Freeman, and he prays that his said vendors and warrantors be allowed to come in and defend for him.

J. F. DAVIS,
Att'y for Puckett.

22 And further, on April 16th, 1883, the p't'ffs' filed their 1st supplemental petition, endorsed, to wit: No. 39. Benjamin Alderson *et al. vs.* D. C. Freeman *et al.* 1st supplemental petition. Filed April 16th, 1883. J. H. Finks, clerk.

Which is in words, to wit:

BENJAMIN ALDERSON *et al.*
vs.
D. C. FREEMAN *et al.* } No. 39.

Now come the plaintiffs with leave of the court and, excepting to defendants' pleadings filed herein this day, endorsed 2d amended original answer, which sets up a claim for taxes, costs paid by defendants on the land in controversy, and a claim of $250 and interest paid J. E. Head, in or about the ——, say that the same is insufficient in law, and shows no cause of defence, and of this pray the judgment of the court.

E. H. GRAHAM,
Att'y for P't'ff-.

And specially excepting to said pleading, plaintiffs say:

1st. That the defences and claims set up by said pleading are purely equitable in their character, and are not cognizable in
23 a court of law, and cannot be here heard in this case.

2d. That all of their allegations about notice given to Henry Alderson of the sale to Head—offers to let him redeem same—present no defence to this action is impertinent, and cannot be heard in this case, and should be stricken out.

3d. That said pleading shows on its face that the matters and claims attempted to be set up by it are bound by the statutes of limitation, and that their said claim has not been commenced and prosecuted within two years after their cause of action accrued to them; of all of which plaintiffs pray the judgment of the court.

E. H. GRAHAM,
Att'y for P't'ffs.

And, answering said plea, if required, plaintiffs deny all and singular the allegations therein contained.

And, further answering, if required, plaintiffs say that suit has not been commenced and prosecuted on said claims attempted to be set up in said plea within two years after their cause of action accrued to them on the same, if any they have; wherefore they say that the same is bound by the statute of limitation in such cases made and provided, and of this they put themselves upon the country.

E. H. GRAHAM,
Att'y for P't'ffs.

24 *Patent of Land to Henry Alderson.*

Endorsed, to wit: Copy. No. 1081. Vol. 2. Henry Alderson. ⅓ league. 2d class. Filed April 16, 1883. J. H. Finks, clerk. Benj. Alderson *et al. vs.* D. C. Freeman *et al.* No. 39.

Which is in words, to wit:

No. 1081. Vol. 2.

In the name of the State of Texas, to all to whom these presents shall come:

Know ye, I, E. M. Pease, Governor of the State aforesaid, by virtue of the power vested in me by law, and in accordance with the laws of said State in such case made and provided, do by these presents grant to Henry Alderson, his heirs or assigns, forever, one-third of a league of land, situated and described as follows:

In Milan district, McLennan county, between the Leon and head of the South Bosque, about 2½ miles S., 75° W. from Waco, by virtue of certificate No. $\frac{3018}{3119}$, issued by the Commissioner of the General Land Office September 1st, 1853, as a duplicate of certificate No. —, issued by the board of land commissioners of Harrisburg county, April 20th, 1838. Beginning at a mound the S. W. corner of Clayton Harper's survey; thence S. 60° W. 2,420 varas to the N. W. corner of John Lyndal's survey in the N. line of Francis Ramsdale's survey; thence N. 71° W. 920 varas, the S. E. corner of J. R. Nelson's survey; thence N. 19° E. 1,425 varas said Nelson's N. E. corner; thence N. 71° W. 2,097 varas to a mound in the N. line of Isaac Frank's survey; thence N. 60° E. 3,312 varas to corner in the S. line of said Harper's survey; thence S. 30° E. with said survey, 3,196 varas to the beginning. Hereby relinquishing to him, the said Henry Alderson and his heirs or assigns forever, all the right and title in and to said land heretofore held and possessed by the said State, and I do hereby issue this letter-patent for the same.

In testimony whereof I have caused the great seal of the State to be affixed, as well as the seal of the General Land Office.

Done at the city of Austin on the 16th day of July, in the year of our Lord one thousand eight hundred and fifty-five.

E. M. PEASE, *Governor.*

S. CROSBY,
Commissioner of the General Land Office.

GENERAL LAND OFFICE, AUSTIN, *April 12th,* 1881.

I, W. C. Walsh, Commissioner of the General Land Office of the State of Texas, hereby certify that the foregoing is a true and correct copy from the record kept in this office.

In testimony whereof I hereunto set my hand and affix the impress of the seal of said office the date last above written.

[SEAL.]

W. C. WALSH,
Commissioner, General Land Office.

Verdict and Judgment.

In the United States Circuit Court for the Northern District of Texas' at Waco.

TUESDAY, *April 17th,* 1883.

Be it remembered that at a regular term of the circuit court of the

United States for the fifth circuit and northern district of Texas, at the city of Waco, in McLennan county, and said circuit and district, on the 17th day of April, A. D. 1883, present and presiding the Honorable Andrew P. McCormick, United States district judge for the northern district of Texas; J. C. Bigger, United States attorney for said district; J. A. McKee, United States marshal for said district, and J. H. Finks, clerk of said court, when and where the following proceedings, among other things, were had, to wit:

* * * * * * * *

BENJ. ALDERSON *et als.*,
vs.
D. C. FREEMAN *et als.* } No. 39.

APRIL 17TH, 1883.

28 This day came the parties, by their attorneys, and thereupon came a jury of twelve good and lawful men, to wit: C. W. Hickey, D. C. Carr, J. B. Johnson, R. Rutherford, G. W. Ballard, C. Rowan, J. P. Poole, C. H. Moore, Wm. Evans, F. M. Huffhines, R. A. Ferguson, and J. R. Davis, who, being duly drawn, selected, and impanneled, and sworn well and truly to try the issues joined between the parties, upon their oaths, and after hearing the evidence and argument of counsel and the charge of the court, retired to consider of their verdict; and, after duly considering the same, returned into open court the following verdict, to wit: "We, the jury, find for the plaintiff. D. C. Carr, foreman." It is therefore ordered and adjudged by the court that the plaintiffs, Benjamin Alderson, Amelia Alderson, Malinda Johns, joined by her husband, Robert Johns; Alice Grimes, joined by her husband, B. Grimes; James Alderson, and W. Tarlton Alderson, minors, who *due* by their next friend, R. H. Shelton, Mary Johns, joined by her husband, Robert Johns, Jr.; Adeline Emminezer, joined by her *her* husband, William Emminezer; Gibson
29 Alderson and John Alderson, do have and recover of the defendants, Mary E. Freeman, D. C. Freeman, J. B. Puckett, Wm. Moore, Wm. J. G. McIlhenney, Rosa A. Freeman, and G. N. Morrison, the premises described and bounded as follows: All of that part of the survey of land in the western part of McLennan county, Texas, patented to Henry Alderson by the State of Texas by patent dated on or about July the sixteenth, A. D. 1855, described as follows, to wit: Beginning at the southeast corner of said Alderson survey, which corner is the southwest corner of the survey of 5,892,034 square varas patented to the heirs of B. C. Wallace, dec'd, by patent dated November 5th, A. D. 1872, for the southeast corner of this survey, and running thence north 30° west with the east line of said Alderson survey and west line of said Wallace sixteen hundred and eight (1,608) varas to a stake for corner; thence south 60° W., nineteen hundred and fifty (1,950) varas, more or less, to the east line of the J. R. Nelson survey; thence south
30 19° W. with the line of said Nelson survey to the southeast corner of said Nelson survey, on the north line of the Francis Ramsdale survey; thence running in a southerly direction

with the north and east lines of the said Francis Ramsdale survey to the point on the same, which is south 60° W. from the said beginning corner. The southwest corner of said Alderson; thence north 60° E., twenty-four hundred and twenty (2,420) varas, more or less, with the south line of the said Alderson survey to the said beginning corner, the land above described being the south one-half (½) of the said Alderson survey; and that they have their writ of possession for the same, and that the said plaintiff do have and recover of the said defendants, except Rosa Freeman and G. N. Morrison, their costs in this behalf expended, for which they may have their execution; and the defendants, Rosa Freeman and G. N. Morrison, having by their pleadings filed in this case, disclaimed any title to or possession of any part of the above-described premises, it is further ordered that they have and recover of the said plaintiffs
their costs in this behalf expended, for which they may
31 have their execution.

Motion for New Trial.

Endorsed, to wit: No. 39. Benj. Alderson *et al. vs.* D. C. Freeman *et als.* Motion of def'ts for new trial. Filed April 18, 1883. J. H. Finks, clerk.

Which is, to wit:

In U. S. circuit court, Northern District of Texas, at Waco.

BENJ. ALDERSON *et als. vs.* D. C. FREEMAN *et als.*

Now comes defendants and moves the court to grant them a new trial in this case, for the reasons following, to wit:

1st. The court erred in admitting in evidence over the objections of defendants the answers of witnesses, Young, Mitchell, and others, as to statements and declarations of Henry Alderson for the purpose
of proving his identity and the heirship of plaintiffs.

32 2d. The court erred in sustaining objections of plaintiffs to the judgment & decree execution thereon and sheriff's deed thereunder, in case of D. C. Freeman *et als. vs.* Henry Alderson, from the district court of McLennan County, Texas, offered in evidence by def'ts, and in excluding same from the jury.

3d. The verdict of the jury is contrary to the evidence in this: It was made manifest to the jury by preponderance of evidence that the land described in plaintiff's petition is not the same described in the patent to Henry Alderson, and that there is a variance in the *locus in quo*, and an excess in the latter over the land claimed in the former of at least 373 acres, and that plaintiffs were only entitled to recover of the tract of land sued for 365 acres.

J. A. DAVIS.
HERRING, KELLY & WILLIAMS,
Att'ys for Def'ts.

33 *Order Overruling Motion for a New Trial.*

Motion submitted and judgment entered as follows:

WEDNESDAY, *April 18th*, 1883.

Court met pursuant to adjournment.

Present: The Hon. A. P. McCormick, judge presiding, and the officers of court, U. S. att'y, marshal, & clerk.

BENJ. ALDERSON *et al.*
vs.
D. C. FREEMAN *et al.*
No. 39.

APRIL 18TH, 1883.

On this day, the defendants' motion for a new trial coming on to be heard, and both parties appearing by attorney, and the court being fully advised, and the law appearing to be for the plaintiffs, it is ordered by the court that the motion be and is in all things refused, to which ruling the defendants except.

* * * * *

34 *Defendants' 1st Bill of Exceptions. Filed April 24, 1883.*

In U. S. Circuit Court for Northern District of Texas, at Waco.

BENJ. ALDERSON *et als.*
vs.
D. C. FREEMAN *et als.*
No. 39.

Be it remembered that at the trial of the above-entitled cause the defendants offered in evidence the following muniments of title, to wit:

D. C. & G. R. FREEMAN
vs.
HENRY ALDERSON.
No. 453.

And now at this day, this cause coming on to be heard, the plaintiffs appeared by their counsel, and the defendant appeared not, but wholly made default, and it appearing to the court that said defendant had been legally cited by publication, and this is the second term after the return of citation, executed and served as aforesaid, thereupon came a jury of good and lawful men, to wit, W. C. Walker and eleven others, who, being sworn and empanneled to try this cause and a true verdict to render according to the law and the testimony, and after hearing the evidence and the charge of
35 *of* the court, returned from the jury-box the following verdict:

"We, the jury, find for the plaintiffs.

"W. C. WALKER, *Foreman.*"

It is, therefore, considered, adjudged, and decreed by the court that said plaintiffs do have and recover of and from the said defendant one undivided one-half of the land located in the county

of McLennan and State of Texas, by virtue of the headright certificate of the said defendant for one-third of a league of land, issued by the board of land commissioners of Harrisburg county to the said def't, Henry Alderson, said certificate being duplicated, No. $\frac{301}{311}\frac{8}{9}$, and the land located and surveyed and patented by virtue of said $\frac{1}{3}$-league certificate being described by metes and bounds as follows, to wit:

Beginning at a mound, the S. W. corner of Clayton Harper's survey, thence south 60° W. 2,420 varas to the N. W. corner of John Lindon's survey, in the N. line of Francis Ramsdale's survey; thence 71 W. 920 varas, S. E. corner of J. R. Nelson's survey; thence 19° E. 1,425 varas, said Nelson's N. E. corner; thence N. 71° W. 2,079 varas to a mound in the N. line of Isaac Frank's; thence N. 60° E. 3,312 varas to corner in the S. line of said Harper's
36 survey; thence S. 30 E. with said survey 3,196 varas to the beginning.

It is further ordered by the court that Neill McLennan, S. M. Jenkins, and G. B. Erath be commissioners, and empowered, by proper process, to petition and divide said land and set apart by metes and bounces one-half thereof, according to quantity and quality, to said plaintiffs, and make their return and report of the half so set apart for plaintiffs to the next term of this court.

It is further ordered, adjudged, and decreed by the court that plaintiffs do have and recover of and from the defendant judgment for all costs in this case, to be taxed against him, and that execution be stayed thereon until the report of said commissioners is returned and adopted by the court, and final decree herein be entered up thereupon.

STATE OF TEXAS, *McLennan County:*

I, M. P. Nichols, clerk of the district court in and for the county of McLennan, do hereby certify that the foregoing is a true and correct copy of a judgment rendered in the aforesaid cause, on the 1st day of October, A. D. 1858, as appears of record in my office.
37 Given under my hand and the seal of said court, at office in Waco, this 7th day of July, A. D. 1859.

[SEAL.] M. P. NICHOLS,
Clk D. C., McLennan Co., Texas.
Per JAMES ROBINSON, *Deputy.*

D. C. and G. R. FREEMAN *vs.* HENRY ALDERSON.

This day in this cause the commissioners appointed at the fall term, A. D. 1858, of this court to partition and divide the land in controversy in this suit submit the following report, to wit:

THE STATE OF TEXAS, *County of McLennan:*

To the honorable the district court of said county:

The undersigned commissioners, appointed at the fall term of said court to partition, divide, and set apart by metes and bounds, according to quantity and quality, one-half of Henry Alderson's one-

third league of land situated in said county to D. C. and G. R. Freeman, respectfully offer the following as report of the result of their labors, to wit:

On the 25th and 26th days of March, 1859, they went upon said land and, after due examination, found the same susceptible
38 of an equal division in quantity, the quality being equal as far as they [were] able to determine, [and] proceeded to divide the same in two equal parcels, lots Nos. 1 & 2, beginning at the S. E. corner of said Alderson's survey for the S. E. corner of lot No. 1; thence S. 60° W. 2,420 vs. to Alderson's S. W. corner in the N. line of a survey in the name of Francis Ramsdale; thence N. 71° W. with the N. line of the same 920 vs. to the S. W. cor., which is also the S. corner of J. R. Nelson's survey; thence N. 19 E. 1,415 vs. with his east line to N. W. cor. of lot No. 1; thence N. 60 E. 1,950 vs. to N. E. cor. in said Alderson east line; thence S. 30 E. with the same 1,608 vs. to the place of beginning. Beginning lot No. 2 at the N. E. corner of lot No. 1, thence S. 60 W. 1,750 vs. to N. W. cor. of same for N. W. cor. of this lot; thence N. 19 E. 10 vs. to the east cor. of Nelson's survey; thence N. 71 W. with the N. line of the same & the Alderson's survey 2,079 varas to the N. W. corner; thence N. 60 E. 3,312 vs. to Alderson's N. E. cor. for N. E. cor. of this survey; thence S. 30 E. 1,588 vs. to the place of beginning, containing each 738 acres, or ½ of said ⅓ league; & they do hereby set apart and declare lot No. 2 to be the portion allotted to said
39 D. C. & G. R. Freeman; all of which is respectfully submitted.

S. M. JENKINS,
Surveyor McLennan County.
G. B. ERATH,
Commissioners.

It is considered by the court that said report be approved, and that said above parcel of land set out as lot No. 2 be and is divested from the said Henry Alderson and vested in said D. C. & G. R. Freeman; and it is also considered that the said D. C. and G. R. Freeman have and recover of the said Henry Alderson all costs in this behalf expended for which execution may issue.

THE STATE OF TEXAS, *County of McLennan:*

I, M. P. Nichols, clerk of the district court in and for the county of McLennan, do hereby certify that the foregoing is a true and correct copy of a decree made in the foregoing cause on the 31st day of March, A. D. 1859, as appears of record in my office.

Given under my hand and the seal of said court, at office in Waco, this 7th day of July, A. D. 1859.

[SEAL.] M. P. NICHOLS,
Clerk of the District Court of McL. Co.,
Per JAMES ROBINSON, *Deputy.*

40 THE STATE OF TEXAS, *McLennan County:*

I, R. M. Billingsley, clerk of the county court of McLennan county, hereby certify that the above and foregoing transcript was filed in my office for record on the 8th day of July, at 8 o'clock a. m.,

1859, and was duly recorded on the 8th day of July, at 4 o'clock p. m., A. D. 1859, in book "I" on pages No-. 83, 84, & 85.

In witness whereof I hereunto set my hand and the seal of the county court of McLennan county, at office in Waco city, this 8th July, A. D. 1859.

[SEAL.]

R. M. BILLINGSLEY,
Clerk Co. C't McL. Co.
By J. C. NEWTON, *Dep'ty.*

Execution and Return Thereon. Issued May 31, *A. D.* 1859. *M. P. Nichols, Clerk.*

D. C. & G. R. FREEMAN
vs.
HENRY ALDERSON. } No. 453.

Execution.

The State of Texas to the sheriff of the county of McLennan, Greeting:

Whereas on the 31st day of March, A. D. 1859, in the district court of McLennan county, D. C. and G. R. Freeman recovered judgment against Henry Alderson for the sum of 61.45, all costs of a
41 suit as per bill annexed, therefore you are hereby commanded that of the goods, chattels, lands, & tenements of the said Henry Alderson you do make the sum of sixty-one & $\frac{45}{100}$ dollars, all cost of suit as per bill annexed,
42 and your legal fees for collecting the same.

Herein fail not, but of this writ and how you have executed the same due return make to the next term of our district court, to be begun & holden on the 3d Monday in September, A. D. 1859.

Attest M. P. Nichols, clerk of said district court, & seal of said court affixed, at office, in the town of Waco, this the 30th day of May, A. D. 1859.

[SEAL.]

M. P. NICHOLS,
Clerk D. [C.] McL. Co., Texas.

Bill of Costs Taxed.

Fil'g 8 papers, & citation to printer	1 30
Bond for cost and affidavit, & docketing & tax costs	1 65
2 orders & 2 continuances & 2 appearances	1 50
Swearing jury, &c., judgment & commission of partition	1 50
Final judg't, certificates, & jury fee	4 50
Final record & execution & return	9 00
Printer's fees, $21, and surveyor's fees, $20	41 00
Sheriff's fees	1 00
	$61 45
Add on levy, return'g, &c.	4 34
	$65 79
Deed	1 00
	$66 79

Rec'd in office May 31st, A. D. 1859, and levied on the following tract of land, lying and being in the county of McLennan,
43 State of Texas, being one equal half of the ⅓ (third) of a league of land granted to Henry Alderson with the following metes and bounds: Beginning at the S. E. corner of said Alderson's survey for the S. E. corner of lot No. 1; thence S. 60° W. 2,420 v's to said Alderson's S. W. corner in the N. line of a survey in the name of Francis Ramsdale; thence N. 71° W. with the N. line of the same 920 v'rs to the S. W. cor., which is also the south cor. of J. R. Nelson's survey; thence N. 19° E. 1,415 v's with his east line to N. W. corner of lot No. 1; thence N. 60° E. 1,950 v's to N. E. cor. in said Alderson's east line; thence S. 30° E. with the same 1,608 v'rs to the place of beginning, containing 738 acres, or one-half of said ⅓ of a league, of land, and being lot No. 1, as surveyed by S. M. Jenkins, surveyor of McLennan co., & G. B. Erath, com'rs, as appears of record in the office of district clerk of said county in the minutes of the spring term, 1859, of the district court in and for said county, said above-described land being levied on as the property of defendant, Henry Alderson, to satisfy the within execution this May 31, '59.

JOHN McLENNAN, *Sh'ff*,
By J. A. ECHOLS, *Dep'ty.*

By virtue of the within execution I did, on the 31st day of
44 May, 1859, levy on the aforesaid tract of land, the property of said Henry Alderson, as described and advertized twenty days prior to sale day, and on the fifth day of July, 1859, it being the first Tuesday of said month & sale day under said levy, did offer the same for sale at the court-house door, at public outcry, to the highest bidder, for cash; and —— Head bid the sum of sixty-six dollars and seventy-nine cents ($66.79); the same being the highest and best bid said Head was declaired the purchaser of said land, and in accordance to which I executed a deed for said land to the purchaser, J. E. Head. Advertizements were posted at three public places in McLennan county & State of Texas, one of which was at the court-house door in the town of Waco. The said purchase-money was paid to me by said James E. Head this July 5th, 1859.

JOHN McLENNAN, *Sh'ff*,
By J. A. ECHOLS, *Deputy.*

45 *Sheriff to Head.*

STATE OF TEXAS, *McLennan County:*

Know all men by these presents, that I, John McLennan, sheriff in and for said county & State, by virtue of an execution to me directed on the 30th day of May, A. D. 1859, reciting that "whereas on the 31st day of March, A. D. 1859, in the district court of McLennan county, D. C. and G. R. Freeman recovered judgment against Henry Alderson for the sum of $61.45, all costs of suit, as per bill annexed, & commanding me that of the goods, chattels, lands, and tenements of the said Henry Alderson to make the sum of $61.45 dollars, all

costs of suit, & legal fees for collecting the same; & whereas I, the said sheriff, by my deputy, J. A. Echols, did, on the 31st day of May, A. D. 1859, levy the said execution on the following tract of land, lying & being in the county of McLennan, State of Texas, being one equal half of the $\frac{1}{3}$d (third) of a league of land granted to Henry Alderson, with the following metes and bounds: Beginning at the S. E. cor. of said Alderson survey for S. E. corner of lot No. 1; thence S. 60° W. 2,420 v's to said Alderson's S. W. corner in the north line of a survey in the name of Francis Ramsdale; thence N. 71 W. with the north line of the same 980 v's to the S. W. corner, which is also the
46 south corner of the J. R. Nelson's survey, thence N. 19 E. 1,415 v's with his east line to N. W. corner of lot No. 1; thence N. 60. E. 1,950, v's to N. E. corner in said Alderson's east line; thence S. 30 E. with the same 1,608 varas to the beginning, containing 738 acres, or half of said one-third of a league of land, and being lot No. 1, as surveyed by S. M. Jenkins, surveyor of McLennan county, and G. B. Erat, com'rs, as appears in the office of the district clerk of said county, in the minutes of the spring term, 1859, of the district court in and for said county, said above-described land being levied on as the property of defendant, Henry Alderson, to satisfy the aforesaid execution; and whereas the said land was advertised for more than twenty days by three advertisements of the sale thereof, one at the court-house door of said McLennan county, the other two at two other public places; and whereas on the first Tuesday of July, A. D. 1859, the same being the 5th day of the month, between the hours of ten o'clock a. m. and four o'clock p. m., I proceeded, in accordance with said advertisements of sale, to offer said above-described tract of land at the court-house door of said McLennan county to the highest bidder, for cash, at public
47 outcry, and James E. Head having bid the sum of sixty-six $\frac{79}{100}$ dollars ($66.79), & the same being the last, best & highest bid for said land, I knocked the same off to him as the purchaser thereof: Now, therefore, know ye that by virtue of the powers in me vested by law, & of the premises & for & in consideration of the said sum of sixty-six $\frac{79}{100}$ dollars ($66.79), cash in hand paid by the said James E. Head, the receipt of which is hereby acknowledged and acquitted, I have bargained, granted, sold, assigned, and set over, & do by these presents bargain, grant, sell, assign, & set over, to the said James E. Head, his heirs & assigns, all the right, title, & interest of the said Henry Alderson in & to the above-described tract or parcel of land, to have & to hold the same with all & singular the rights, members, appurtenances, & hereditaments thereunto belonging unto him, the said James E. Head, his heirs, & assigns in fee-simple forever, against the claim or claims of the said Henry Alderson, & all persons whomsoever claiming, or to claim, the same by, through, or under the said Henry Alderson.

48 In testimony whereof witness my official signature at Waco, Texas, this the 5th day of July, A. D. 1859.

JOHN McLENNAN,
Sheriff McLennan County, Texas.
By J. A. ECHOLS, *Dep'ty.*

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THE STATE OF TEXAS, *McLennan County:*

Before me, Marcus D. Herring, a notary public within & for said county & State, commissioned & bonded & qualified, personally appeared John McLennan, sheriff of McLennan co., Texas, by J. A. Echols, deputy, to me well known, who acknowledged that he executed & delivered the above & foregoing deed or instrument of writing to James E. Head, for all the purposes and considerations therein set forth & contained.

To certify which, witness my hand and the impress of my official seal, at office, in Waco, this July 5th, A. D. 1859.

[SEAL.] M. D. HERRING,
Notary Public, McLennan Co., Texas.

Filed for record July 6th, 1859, at 6 p. m. Recorded 8th July at 12 o'clock a. m.

49 *Deed from Head to Freeman.*

STATE OF TEXAS, *McLennan Co.:*

Know all men by these presents, That I, James E. Head, for and in consideration of a hundred and seventy-eight dollars, to me in hand paid by D. C. Freeman, Jr., the receipt of which is hereby acknowledged, have bargained and sold, and do by these presents convey to said D. C. Freeman, Jr., all that parcel of land lying in McLennan county, Texas, being one-half of the ⅓ of a league granted to Henry Alderson, & the same land that was conveyed to me by John McLennan, sheriff of McLennan county, on the 5th day of July, A. D. 1859, & recorded in the said county & described as follows: Beginning at the S. E. corner of H. Alderson for S. E. corner of this tract; thence S. 60 W. with Alderson's line, 2,420 v's; thence N. 71° W. with F. Ramsdale's line, 920 v's, to the S. corner of J. R. Nelson's survey; thence N. 19 E. 1,415 v's, to Nelson's E. cor.; thence N. 60° E. 1,950 v's to Alderson's line, & thence S. 30 E. 1,608 varas to the beginning, containing 738 acres, more or less, to have and to hold the same, together with all and singular the rights, privileges, and appurtenances to the same belonging to him,
50 the said Freeman, his heirs or assigns. And I warrant the title only as against myself & those claiming under me, if any there be, designing to give only a quit claim to the same by this instrument.

Witness my hand and seal, this September 21st day, 1859.

J. E. HEAD.

THE STATE OF TEXAS, *McLennan County:*

Before me, Marcus D. Herring, a notary public in and for said county and State, commissioned, bonded, and qualified, personally appeared J. E. Head, to me well known, whose genuine signature appears above, who acknowledges that he executed and delivered the above and foregoing deed or instrument of writing, bearing date the 21st day of September, A. D. 1859, to D. C. Freeman, Jr., for all the purposes and considerations therein specified.

To certify which witness my hand and the impress of my official seal of office, at office in Waco, this 21st Sept., A. D. 1859.

[L. S.] M. D. HERRING,
Notary Public, McLennan Co., Texas.

THE STATE OF TEXAS, *McLennan County:*

51 I, R. M. Billingsley, clerk county court of said county, do hereby certify that the instrument of writing on the reverse hereof, with its certificates of authentication, was filed in my office for registration this 21st day of September, A. D. 1859, at 9 o'clock a. m., and duly recorded the same day at 3 o'clock p. m., A. D. 1859, in record, of said county, in book "I," on pages 190 & 191.

Witness my hand and seal of the county court of said county, at office in Waco City, the day and year last above written.

[SEAL.] R. W. BILLINGSLEY,
Clerk Co. C't, McL. Co.

52 To which plaintiffs, by their counsel, objected, for the following reasons, to wit:

1st. Because the said judgment for costs against the defendant, Henry Alderson, in cause 453, entitled D. C. and G. R. Freeman *vs.* Henry Alderson, through which defendants seek to *dereign* title, and the execution thereunder and sheriff's deed to Jas. E. Head to the land in controversy in this suit did not pass the title, and said judgment for costs and proceedings thereunder were null & void, because 1st, said judgment for costs is *in personam;* and it appears from said judgment and the petition and other papers in said cause, No. 453, which were exhibited in evidence, that it was rendered against said Alderson without his personal appearance in the action or personal service of the citation upon him, but on citation by publication only, while he was a non-re-ident of the State of Texas and a resident citizen of the State of California.

2d. Said judgment for costs is not a judgment *in rem.*, and, therefore, constitutes no basis of title in the defendant.

3d. Because the affidavit for citation by publication in said cause No. 453, as shown by the original affidavit exhibited in evidence, was made before a notary public of Travis county, when by

53 law it should have been made before the clerk of said district court of McLennan county, and for this reason the court acquired no jurisdiction of the case, & said judgment and all the proceedings thereunder had were null & void.

Said objections were argued by counsel and considered by the court, and the 1st & 2d was sustained by the court, and said muniments of title excluded from the jury; to which ruling of the court counsel for defendants excepted, and here now tender this their bill of exception, and pray that it be signed & sealed by the court and certified by the clerk as a part of the record herein to our Supreme Court of the United States; which is accordingly so done and ordered in term April 24, 1883.

A. P. McCORMICK,
Dis't Judge.

54 *Defendants' 2d Bill of Exceptions.*

Endorsed to wit: No. 39. Benj. Alderson *et als. vs.* D. C. Freeman *et als.* Defendant's bill of exceptions, No. 2. Filed April 24th, 1883. J. H. Finks, clerk.

Which is in words, to wit:

In U. S. Circuit Court for the Northern District of Texas, at Waco.

BENJ. ALDERSON *et als.*
vs.
D. C. FREEMAN *et als.*
} No. 39.

Be it remembered that on the trial of the above-entitled and numbered cause, the plaintiffs offered to prove by the deposition of T. G. Cox in order to establish the identity of Henry Alderson as the grantee of the land sued for and the heirship of plaintiffs, the following, to wit: "From the information which I received, he (meaning said Alderson) went to Texas; said information was derived from his family at the time, and from him after his return. I boarded with the same family for whom he worked, and often heard him talk about his life in Texas. * * * I only knew from his report what occupation he was in while in Texas. He said he was
55 in the army of Texas during most of the time he was there. * * * While in Texas my information is that he was a soldier, at least a part of the time. I only knew it (that he was in Texas) from the information rece'd from his family while he was in Texas, and from him after his return. He often talked to me about his soldier life in Texas. It was interesting to me; what he told me about it corresponded with what I have read of the military campaigns in Texas at that time. Dead, (meaning said Alderson is dead) from the information I have received; killed several years ago in an accident in California by jumping from a stage-coach, while the team was running away. All I know about it is what I have heard him say. He said he owned land there (in Texas). He claimed to have gotten land out there (in Texas) by reason of his services in the army, and that he had located them, a part of them, and a part he had not located."

This witness answered on cross-examination that he never had seen Henry Alderson in Texas or in California.

56 And in like manner and for the same purpose plaintiffs offered to prove by Robert Johns as follows, to wit: "He (said Alderson) told me he was in the army of Texas. I have seen letters written by him to his father's family while he was in Texas. * * * While in Texas I understood he was in the army. * * * He was (in Texas) according to his own statements and those of his family. * * * I saw his discharge from the Texas army, and heard it read. I also saw his papers giving him rights to land in Texas. * * * My recollection is that he told me he enlisted in Captain Price's company in New Orleans. * * * From the information I have he is (dead). I have seen letters written here by John Young, from California, showing that he is dead. He had some

money when he was killed, and said Young, attorney, sent it here to his heirs. He was so injured in an accident by a team running away with a stage-coach that he died in California in Sept., 1879. He lived in California. * * * He told me he had claims to land in Texas on account of his services in the Texas army."

Upon cross-examination, this witness stated that he himself
57 never was in Texas or California.

And in like manner and for the same purpose plaintiffs offered to prove by Amelia Alderson as follows, to wit: "I heard him (said Alderson) speak of having been in Texas often, and my mother received letters from him while he was in Texas, which I have heard read; said letters are now lost or misplaced. I only know he was a soldier in the Texas army by what he told me and what I have heard him say himself. He is dead. He died in California, where he was living in 1879."

Upon cross-examination this witness said: "I never saw him in Texas, nor in California."

And in like manner and for the same purpose plaintiffs offered to prove by Albert Mitchell as follows, to wit: I learned from Henry Alderson that he served five years in the army in Texas, and he related to me many incidents of his life in Texas while in the army. He had many papers, which he exhibited to me, showing his claims he had for lands in Texas and money due him because of his connection
58 with the army in Texas. From what he stated to me he had been with the army in Texas previous to the time he and Freeman were at my house, about the year 1854. I do not remember what years he said he was in the army, but said he was in the army in Texas five years. I gathered from what he said to me that he was a soldier in Texas all the time he was out there. I don't now remember what army he said he was in, whether the army of the Republic of Texas or not. The papers he showed me indicated what army he was in, and he told me, but I have now forgotten. He did not say what position he held in the army; if so, I have forgotten."

Upon cross-examination this witness said: "I have never lived in Texas; I never knew Henry Alderson elsewhere than Warren county, Kentucky. I never saw him in Texas. All I know is his own statements and the papers he had."

And in like manner and for the same purpose plaintiffs of-
59 fered to prove by J. N. Young, of Sacramento county, California, as follows, to wit: "I do not know of my own knowledge what Stake he (Henry Alderson) came from to California. He told me he came from Kentucky. I do not remember that he ever told me the county or town within the State of Kentucky from which he came. He told me at different times while in conversation with him that he came from Kentucky. He may have told me the county, but I do not remember that."

After stating that he transacted business for Henry Alderson; that he died at Michigan Bar, in Sacramento, California, on or about the 15th day of Sept., 1877, and that all his land papers were placed in the possession of witness by Henry Alderson, he exhibits as part of his answers quite a number of said papers, one of which only was

read to the jury in evidence over objections of defendants' counsel as follows, to wit: "This is a true copy of contract between Henry Alderson and D. C. and G. R. Freeman. This memorandum made the 18th day of November, 1852, between Henry Alderson and D. C. and G. R. Freeman, witnesseth: That
60 the said Henry Alderson, of Warren Co., Ky., has employed the said D. C. and G. R. Freeman to prosecute his claims to any and all lands or other property, money, &c., which may be due and owing the said Henry Alderson in the State of Texas for military services rendered the late Republic of Texas, or due the said Henry Alderson from any other consideration, and also to obtain and locate the patents for all the land which they may obtain on the said claims from the said State of Texas, and in consideration of these services to be performed by the said D. C. and G. R. Freeman he, the said Henry Alderson, hereby binds himself to convey to them by a valid deed one-half of all the lands, and to pay to them one-half of all the money which they may receive or obtain on the aforesaid claims or claims, and to pay them ten dollars as his part of expenses. But it is to be distinctly understood that if the said D. C. and G. R. Freeman fail to obtain anything on the claim as above specified they are to receive nothing for their services, nor are they to refund the ten dollars advanced by Henry
61 Alderson, and in no case are they to receive more than one-half of whatever they may receive or obtain.

In testimony whereof we have hereunto subscribed our names to duplicate copies.

D. C. FREEMAN. [SEAL.]
G. R. FREEMAN. [SEAL.]
P'r CHAS. FREEMAN. [SEAL.]

To the admissability of all of said evidence so offered by plaintiffs def'ts, by their counsel, objected for the reasons following, to wit:

1st. Because the same is hearsay, and not comprehended within any exception to the general rule, making hearsay evidence admissable.

2d. Because it assumes the identity of the Henry Alderson, whose statements are reproduced as the same man to whom the land in controversy was granted, when this is an independent fact which must be established by original evidence.

And said defendants, by their counsel, further objected to the admis-ability of the paper purporting to be "a true copy of contract between Henry Alderson and D. C. and G. R. Freeman," made an exhibit to the answers of said witness, J. N. Young, because:

1st. It does not prove itself.
62 2d. There is no evidence that it is a true copy of any contract.

3d. It does not appear from what source the Henry Alderson, about whose papers said witness Young is testifying, obtained it, or by whom it was made.

4th. If the original were offered in evidence it would be inadmissable, unless its execution and delivery were established.

Said objections were argued by counsel and considered by the court, and they were overruled by the court, and all of said evidence admitted and read to the jury; to which ruling of the court defendants, by their counsel, excepted, and here now tender this their bill of exceptions, and pray that the same be signed and sealed by the court and certified by the clerk to our Supreme Court of the United States as a part of the record herein, which is accordingly so done and ordered in term.

The foregoing bill of exceptions is approved in connection with the following evidence as to heirship and identity, to wit: In addition to the proof of heirship of plaintiffs and identity of the Henry Alderson they claim through, found in defendant's bill of exceptions No. 2, the plaintiffs introduced the following evidence:

63 1st. The locative contract between the defendant-, D. C. Freeman & G. R. Freeman, and Henry Alderson, dated Nov. 18th, 1852, under which the land in controversy was located by the Freemans, and on which the suit No. 453, entitled D. C. & G. R. Freeman *v.* Henry Alderson, was founded, which contract is on file among the the papers in said cause No. 453. It is the original of the copy of the contract already inserted in bill of exceptions No. 2, and describes Henry Alderson as residing in Warren county, Kentucky, and A. Mitchell is a subscribing witness to it.

2d. The petition of the plaintiff in said cause No. 453 on file among the papers asking a partition of the land under said contract.

3d. Albert Mitchell further testified that he lives in Warren county, Kentucky; that he knew Henry Alderson in Warren county, Kentucky, years ago, and he lived at his house five or six months, and left his house to go to California somewhere about 1854. That he knew one of the Freemans, but does not know whether it was D. C. or not. That this Freeman was at

64 his house in Warren county, Kentucky, about the year 1853 or '54, and then, in his presence, made a written contract with Henry Alderson to locate his Texas lands & have them patented & to collect money due him in Texas by reason of his being a soldier. He states the substance of the contract, which is substantially as in the written contract above referred to, & says that he loaned H. Alderson $10.00 to pay on the contract above referred to. That said Alderson turned over to said Freeman all of his land & money claims in Texas under this contract; that witness kept a copy of the contract at the time, but it was lost during the war; that he advised Alderson in making the contract & did most of the talking for him; that said Henry Alderson had a brother Benjamin, now living in Russellville, Ky., a brother Thomas, who is now dead, a sister, who married Robert Johns, & she now lives in Warren county, Ky.; that he thinks his other brothers and sisters are now dead, but some of

65 them left infant heirs; that he is not intimate with the family & can't describe any more of them; that he has no personal knowledge that he is dead, but has so understood from his relatives in Warren co., & that they have been receiving dividends from his estate in California.

3d. J. N. Young further testified that he is an attorney; that the

Henry Alderson of whom he is testifying was a single man at the time of his death & had never been married; that he died in September, 1877.

4th. F. G. Cox, of Warren co., Ky., further testified that he knew Henry Alderson well from about 1825 or '30 until he left to go to California, except the time he was in Texas; that he lived in Warren county, Ky., until he went to Texas, and also after he returned from Texas until he left for Califoraia; that he went to Texas in 1834 or '35; does not know when he came back from Texas, but knows that he was in Warren co., Ky., in 1846; that he left at his death a brother Benjamin, who resides in Logan county, Ky., and two sisters, Amelia Alderson & Melinda Johns, wife of Robert Johns, who live in Warren county, Ky. He left also the de-cendents
66 of two brothers, James and Thomas Alderson, who were then dead.

5th. Robert Johns, of Warren co., Ky., further testified that he knew Henry Alderson all his life, when he was in Kentucky; that he lived in Warren county, Kentucky, from his earliest recollection till he left to go to California, except while he was in Texas; that he left Kentucky about, he thinks, 1836 to go to Texas; remained there six or eight years, and was a soldier while there; that the last time he saw him was when he boarded a steamboat in Kentucky to go to California, in 1854; that Henry Alderson's father and mother had both died before he did; that he left at his death a brother Benjamin, who lives in Russellville, Logan county, Ky., and two sisters, Amelia Alderson and Malinda Johns, who live in Warren county; he left, also, at his death, the following children of his brother, Thomas Alderson, who was then dead, to wit, Alice Grimes, James Alderson, & William Talton Alderson, and also the following children of James Alderson, who died before Henry, to wit, Mary Johns, Ade-
67 line Eminizer, John Alderson, and Gibson Alderson; that they were all living when Henry Alderson died, and are still living, and are the only brothers & sisters & their descendents of said Henry Alderson.

6th. Amelia Alderson, of Warren co., Ky., further testified that Henry Alderson was her brother, and she has known him from her infancy, in Warren county, Ky., till he went to California, except during the time he was in Texas; that he lived in Warren co., Ky., till he went to Texas, in 1836, or about that time; that he stayed in Texas a few years and came back to Warren county, Ky., and in 1854 he went to California; that he left Kentucky to go to Texas about 1836; while in Texas he was in the army. She further testified that the above-named parties, testified to by Robert Johns, are the heirs and only heirs of said Henry Alderson, dec'ed.

In rebuttal, D. C. Freeman testified that neither he nor G. R. Freeman ever saw Henry Alderson; that their contract with him was made by his cousin and agent, the same person who appears to have signed the contract.

68 He further testified that before the burning of the adjutant general's office at Austin he made a thorough examination of all the papers and muster-rolls therein in order to find out what was

due the Henry Alderson he was representing in land or money for services and residence in the Republic of Texas; and all he could find was that he served in the army nearly six months and was entitled to a bounty warrant for 640 acres of land and a headright of ⅓ of a league.

April 24th, 1883. Bill allowed.

A. P. McCORMICK, *Dist. Judge.*

69 *Defendants' Assignment of Errors.*

Endorsed, to wit: No. 39. Benj. Alderson *et als. vs.* D. C. Freeman *et als.* Assignment of errors. Filed April 30th, 1883. J. H. Finks, clerk.

Which is, to wit:

In U. S. Circuit Court for Northern District of Texas, at Waco. April Term, 1883.

BENJ. ALDERSON *et als.* vs. D. C. FREEMAN *et als.* } No. 39.

Now comes defendants and assign the following errors, to wit:

1st. The court erred in sustaining exceptions of plaintiffs as contained in their 1st supplemental petition, filed herein April 16, 1883, to the 7th paragraph of def't's 2d amended original answer, filed same day.

2d. The court erred in excluding defendants' muniments of title as shown in their bill of exceptions No. 1, filed April 24th, 1883.

3d. The court erred in admitting evidence of plaintiffs
70 over objections of defendants as shown in their bill of exceptions, filed herein April 24, 1883.

4th. There is a variance between the land recovered and described in the judgment and the land described in the original petition, and the land described by metes and bounds in the patent is not the same described in said judgment. The record shows affirmatively that the *locus in quo* of the land recovered is not the same as that granted to Henry Alderson by letters patent in evidence.

HERRING, KELLY & WILLIAMS,
Att'ys for Defts.

Endorsed, to wit: No. 39. Benj. Alderson *et als. v.* D. C. Freeman *et als.* Writ of error. Bond. Approved and filed April 24th, 1883. J. H. Finks, clerk.

Which is in words, to wit:

71 *Bond.*

BENJ. ALDERSON *et als.* vs. D. C. FREEMAN *et als.* } No. 39.

Circuit Court of the United States for the Northern District of Texas.

Know all men by these presents that we, D. C. Freeman, Mary E.

Freeman, J. B. Puckett, William Moore, and William J. G. McIllhenny and P. De Cordova and G. Crow are held and firmly bound unto Benj. Alderson, Amelia Alderson, Malinda Johns, joined by her husband, Robert Johns; Alice Grimes, joined by her husband, B. Grimes; James Alderson, and W. Talton Alderson, minors, who sue by their next friend, R. H. Shelton; Mary Johns, joined by her husband Robert Johns, Jr.; Adeline Eminizer, joined by her husband, William Eminizer; Gibson Alderson, and John Alder-
72 son in the sum of one thousand dollars to be paid to the said obligees, their executors or administrators; to which payment, well and truly to be made, we bind ourselves and each of us, jointly and severally, and our and each of our heirs, executors, and administrators firmly by these presents.

Sealed with our seals — dated this —— day of April, 1883.

Whereas the above-named D. C. Freeman, Mary E. Freeman, J. B. Puckett, William Moore, and William J. G. McIllhenny have prosecuted a writ of error to the Supreme Court of the United States to reverse the judgment rendered in the above-entitled action on the 17th of April, 1883, by the circuit court of the United States for the northern district of the State of Texas, holding a regular session at Waco:

Now, therefore, the consideration of this obligation is such that if the above-named D. C. Freeman, Mary E. Freeman, J. B. Puckett, William Moore, and William J. G. McIllhenny shall prosecute their said writ of error to effect and answer all costs and damages
73 if they shall fail to make good their plea, then this obligation shall be void; otherwise to remain in full force and effect.

D. C. FREEMAN. [SEAL.]
M. E. FREEMAN. [SEAL.]
J. B. PUCKETT. [SEAL.]
WM. MOORE. [SEAL.]
W. J. McILHANEY. [SEAL.]
P. DE CORDOVA. [SEAL.]
G. CROW. [SEAL.]

By D. C. FREEMAN,
Their Vendor or Warrantor.

Sealed and delivered in presence of—
JOSEPH WALKER.
A. G. LUCK.

Approved April 24th, 1883. A. P. McCORMICK, *Judge.*

UNITED STATES OF AMERICA, }
District of Western Texas, } ss:

P. De Cordova and G. Crow being duly sworn depose and say, and each for himself saith, that he is worth the sum of one thousand dollars over and above all his just debts and liabilities.

Sworn to before me, this 23d day of April, 1883.

To certify which witness my official signature and the impress of my seal of office.

GARDNER RUGGLES,
U. S. Commissioner, West. Dist. Tex.

74 UNITED STATES OF AMERICA, ss.

The President of the United States to the honorable the judge of the circuit court of the United States for the northern district of Texas, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said circuit court before you, between Benj. Alderson, Amelia Alderson, Malinda Johns, joined by her husband, Robert Johns; Alice Grimes, joined by her husband, B. Grimes; James Alderson and W. Talton Alderson, minors, who sue by their next friend, R. H. Shelton; Mary Johns, joined by her husband, Robert Johns, Jr.; Adeline Emminezer, joined by her husband, William Emminezer; Gibson Alderson, and John Alderson, plaintiffs, and Mary E. Freeman, D. C. Freeman, J. B. Puckett, William Moore, & William J. G. McIlhenny, defendants, No. 39, a manifest error hath happened, to the great damage of the said defendants, to wit, Mary E. Freeman, D. C. Freeman, J. B. Puckett, William Moore, and William J. G. McIlhenny, as by their complaint appears, we, being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under you seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the second Monday of October next, in the said Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Morrison R. Waite, Chief Justice of the said Supreme Court, the 24th day of April, in the year of our Lord one thousand eight hundred and eighty-three.

[The Seal of the Circuit Court, Southern Dist., Texas, Waco.]

J. H. FINKS,
Clerk of the Circuit Court of the United States at Waco.

Allowed by A. P. McCormick, U. S. dist. judge.
April 24, 1883.

75 [Endorsed:] No. 39. Benj. Alderson *et al. vs.* D. C. Freeman *et al.* Writ of error. Filed April 24, 1883. J. H. Finks, clerk.

76 The United States of America to Benjamin Alderson, Amelia Alderson, Malinda Johns & husband, Robert Johns, Alice Grimes & husband, B. Grimes, James Alderson, and W. Talton Alderson, minors, who sue by their next friend, R. H. Shelton, Mary Johns & husband, Robert Johns, Jr., Adaline Emminezer & husband, William Emminezer; Gibson Alderson, and John Alderson, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States to be holden at Washington on the second Monday of October next, pursuant to a writ of error filed

in the clerk's office of the circuit court of the United States for the northern district of Texas, holding sessions at Waco, wherein Mary E. Freeman, D. C. Freeman, J. B. Puckett, William Moore, and William J. G. McIlhenny are plaintiffs in error and you are defendants in error, to show cause, if any there be, why the judgment rendered against the said plaintiffs in error, as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Morrison R. Waite, Chief Justice of the Supreme Court of the United States, this 24th day of April, in the year of our Lord one thousand eight hundred and eighty-three.

A. P. McCORMICK,
U. S. Dist. Judge.
J. H. FINKS, *Clerk.*

77 On this 24th day of April, in the year of our Lord one thousand eight hundred and eighty-three, personally appeared James A. McKee, U. S. marshal, before me, the subscriber, Jas. A. McKee, and makes oath that he delivered a true copy of the within citation to E. H. Graham, attorney of record at Waco, for the within-named defendants in error.

JAMES A. McKEE,
U. S. Marshal.

Sworn to and subscribed *to* before me, the undersigned, this the 25th day of April, A. D. 1883. Witness my hand & seal of court.

[The Seal of the U. S. Circuit Court, Northern Dist. Texas.]

J. H. FINKS,
Clerk U. S. Cir. Court.

[Endorsed :] No. 39. Benj. Alderson *et al. vs.* D. C. Freeman *et al.* Marshal's cost, $2.00. Filed April 25, 1883. J. H. Finks, clerk.

78 I, J. H. Finks, clerk of the circuit court of the United States, 5th circuit, in and for the northern district of Texas, at Waco, certify that the foregoing seventy-eight pages in writing contain a full and true transcript of the record and the proceedings had as they appear of file and record in this court, in cause No. 39, entitled Benjamin Alderson *et als. versus* D.C. Freeman *et als.*

In testimony whereof I have hereunto set my hand and the impress of the seal of said court, at Waco, this 4 day of August, A. D. 1883.

[Seal of the U. S. Circuit Court, Northern Dist. Texas.]

J. H. FINKS, *Clerk.*

Endorsed on cover: N. Texas C. C. U. S. No. 274. Mary E. Freeman, D. C. Freeman, J. B. Puckett, William Moore, and William J. G. McIlhenny, plaintiffs in error, *vs.* Benjamin Alderson, Amelia Alderson, Malinda Johns and husband, Robert Johns; Alice Grimes & husband, B. Grimes; James Alderson and W. Talton Alderson, minors, by their next friend, R. H. Shelton; Mary Johns and husband, Robert Johns, Jr.; Adaline Emminezer & husband, William Emminezer; Gibson Alderson, and John Alderson. Filed 7th September, 1883.

119-185

FILED
APR 19 1886
JAMES H. McKENNEY
CLERK

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1885.

No. 274.

MARY E. FREEMAN AND OTHERS, PLAINTIFFS IN ERROR,

vs.

BENJAMIN ALDERSON AND OTHERS.

In Error to the Circuit Court of the United States for the Northern District of Texas.

BRIEF FOR PLAINTIFFS IN ERROR.

M. F. MORRIS,
Attorney for Plaintiffs in Error.

JUDD & DETWEILER, PRINTERS.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1885.

No. 274.

MARY E. FREEMAN AND OTHERS, PLAINTIFFS IN ERROR,

vs.

BENJAMIN ALDERSON AND OTHERS.

In Error to the Circuit Court of the United States for the Northern District of Texas.

BRIEF FOR PLAINTIFFS IN ERROR.

I.

STATEMENT OF THE CASE.

The subject of controversy in this case is the title to a tract of land in McLennan county, in the State of Texas, and the suit is one of trespass to try title, the equivalent in the State of Texas of the action of ejectment.

A tract of land, comprising one-third of a league, was in the year 1855 granted by the State of Texas to one Henry Alderson (Record, p. 9), a native of Kentucky, who had

served as a soldier in the armies of the Republic of Texas, and who seems to have died in California in the year 1879. (Record, p. 21.) One undivided half of the tract was claimed by D. C. Freeman (one of the plaintiffs in error) and by one G. R. Freeman jointly, apparently under some conveyance from Alderson. They brought suit to recover it and for partition of the tract between themselves and Alderson. (Record, p. 12–14.) Alderson being at the time (A. D. 1859) a non-resident, process was had against him by publication, as provided by the law of the State. He failed to appear. A trial by jury was had to determine the title. The jury found that the Freemans were entitled to the undivided half which they claimed. The court thereupon proceeded to make partition of the tract between them and Alderson, and commissioners were appointed to survey and apportion the land by metes and bounds. They divided it into two lots, which they numbered 1 and 2 respectively. Lot No. 2 they assigned to the Freemans, and no disposition was made of lot No. 1. The court confirmed the action of the commissioners, adjudged against Alderson the cost of the proceedings, and directed execution to issue for these costs. The sheriff levied the writ of execution, which was thereupon placed in his hands, on lot No. 1 as yet the property of Alderson. Sale was duly made under the execution, and one Head became the purchaser. Some months afterwards the plaintiff in error, D. C. Freeman, purchased from Head. All this occurred in 1859. (Record, p. 12 to 18.)

Twenty-two years afterwards, in 1881, the present suit was instituted by the heirs-at-law of Alderson to recover from D. C. Freeman and his grantees the lot, No. 1, which had thus been sold under writ of execution.

In the circuit court the proceedings under which Freeman acquired title were offered in evidence, and ruled out as insufficient on the ground that the State court did not have jurisdiction to enforce its judgment for costs against

the property in question, and judgment was rendered in favor of the heirs of Alderson.

The writ of error is sued out to reverse this decision.

II.

ASSIGNMENT OF ERRORS.

1. The circuit court erred in ruling that the judgment for costs in the partition suit referred to in the proceedings was a judgment *in personam*, which, in the absence of personal service of process in the suit, could not lawfully justify the levy of execution against the property in question.

2. The circuit court erred in ruling that the judgment in the partition suit and the proceedings had in pursuance of said judgment, under which the plaintiffs in error claimed title, were inadmissible in evidence in this cause.

3. The circuit court erred in ruling that the said judgment and the proceedings in said partition suit and the proceedings of the sheriff under the writ of execution placed in his hands did not pass the title to the property in controversy.

III.

BRIEF OF ARGUMENT.

There is but one substantial point of controversy in this case, and that is whether a judgment for costs rendered in a suit against a non-resident defendant for the partition of lands, when the only service of process against such defendant has been the statutory service by notice of publication, is such a judgment as will justify the issue of execution and the levy of such execution by the sheriff upon the part of the land which was left to the defendant in the partition suit.

Now, if the judgment for costs in the partition suit was essentially a judgment *in rem*, though in form a judgment *in personam*, and the *res*, the property levied upon, had been subjected to the control of the court in that suit, and so remained at the time of the levy, there can be no question as to the jurisdiction of the court to render such a judgment and to sell the property to satisfy it. And this, it is submitted, the record shows to have been the case.

In the case of Cooper *vs.* Reynolds (10 Wallace, 308), and again in the case of Pennoyer *vs.* Neff (95 U. S., 714), the subject of judgments *in rem* and judgments *in personam* is fully considered; and the principles are there laid down by which the present case can be decided.

In the case of Cooper *vs.* Reynolds, Mr. Justice Miller, speaking for the Court, said:

"Jurisdiction of the *res* is obtained by a seizure under process of the Court, whereby it is held to abide such order as the Court may make concerning it. The power to render the decree or judgment which the Court may undertake to make in the particular cause depends upon the nature and extent of the authority vested in it by law in regard to the subject-matter of the cause.

* * * * * *

"If the defendant appears, the cause becomes mainly a suit *in personam*, with the added incident that the property attached remains liable, under the control of the Court, to answer to any demand which may be established against the defendant by the final judgment of the Court. But if there is no appearance of the defendant, and no service of process on him, the case becomes, in its essential nature, a proceeding *in rem*, the only effect of which is to subject the property attached to the payment of the demand which the Court may find to be due to the plaintiff.

"That such is the nature of this proceeding in this latter class of cases is clearly evinced by two well-established propositions: 1st. The judgment of the Court, though in form a personal judgment against the defendant, has no effect beyond the property attached in that suit. No general execution can be issued for any balance unpaid after the

attached property is exhausted. No suit can be maintained on such a judgment in the same court or in any other; nor can it be used as evidence in any other proceeding not affecting the attached property; nor could the costs in that proceeding be collected of defendants out of any other property than that attached in the suit. 2d. The Court in such a suit cannot proceed unless the officer finds some property of the defendant on which to levy the writ of attachment. A return that none can be found is the end of the case, and deprives the court of further jurisdiction, though the publication may have been duly made and proven in court."

In the case of Pennoyer *vs.* Neff, Mr. Justice Field, delivering the opinion of the Court, said:

"Substituted service by publication, or in any other authorized form, may be sufficient to inform parties of the object of proceedings taken where property is once brought under the control of the Court by seizure or some equivalent act. The law assumes that the property is always in the possession of its owner, in person or by agent; and it proceeds upon the theory that its seizure will inform him, not only that it is taken into the custody of the Court, but that he must look to any proceedings authorized by law upon such seizure for its condemnation and sale. *Such service may also be sufficient in cases where the object of the action is to reach and dispose of property in the State, or of some interest therein, by enforcing a contract or lien respecting the same; or to partition it among different owners;* or, when the State is a party, to condemn and appropriate it to a public purpose. In other words, *such service may answer in all actions which are substantially proceedings* IN REM."

The suit, the proceedings in which were offered in evidence in this cause and rejected, was a suit *to partition lands among different owners*, and, therefore, was one of the cases specifically pointed out by this Court in Pennoyer *vs.* Neff as cases wherein process by notice of publication would be sufficient to give jurisdiction to the court. The law of the State of Texas authorized its courts to decree partition of lands within its territorial limits, and that process to give the

courts jurisdiction in such cases should be by notice of publication when the defendants were non-residents of the State.

It seems not to be contended, however, that the State court did not have jurisdiction to decree the partition sought for in the suit in question. And we presume it will not be contended, certainly it cannot successfully be contended, that the court did not have jurisdiction to adjudge costs against the defendant, for costs are incidental to every judgment and decree, provided, of course, that such costs were enforced out of any property brought under the control of the court in the suit, as required by the rule recognized in the case of Cooper *vs.* Reynolds, above cited. Now, was not the judgment for costs enforced out of the very same property that had been brought under the control of the court in the very same suit?

The whole property, the entire tract of land, and not merely one-half of it, had been taken under the control of the court for the purpose of the partition. If, in the course of the proceedings, it had been found that the land was incapable of specific partition, and a decree should have been passed for the sale of it, as authorized by the law of the State, which does not differ in this regard from the laws of most, if not all, of the other States of the Union, could it be maintained that, in the division of the proceeds of sale, the court would not have jurisdiction to decree the payment of costs out of the defendant's share? And assuredly the land itself which is decreed to be sold is just as much under the control of the court as the proceeds of sale would be in the event of sale. If it was money of which a division was sought no one will question the right of the court to adjudge the payment of costs out of the defendant's share of it. Does it make any difference that the property under the control of the court is land and not money? The property was certainly under the control of the court to make the partition. It had the right to adjudge partition. It had the right to

adjudge the costs of partition. It had the property under its control for the purpose of the payment of costs as well as for the principal purpose of partition; and costs indeed are the first charge, and might have been enforced before the assignment or delivery of his specific share to either party.

It might be asserted, perhaps, that between the making of the partition and the levy of the execution some interval of time, it matters not how short, intervened, and that by such interval the court had lost its control over the part of the land which remained to the defendant in the suit. This proposition would certainly involve a very great refinement of the question of jurisdiction. But it can be met in this case with another refinement which has more weight. The decree of the court adjudging partition (Record, p. 14) assigns lot No. 2 to the Freemans, and vests the title in them, but makes no disposition whatever of lot No. 1. The necessary inference, therefore, is that it retains the control of lot No. 1 for such further proceedings as may be necessary or proper. The question of costs was the only question that remained to be finally determined. The final determination of that question had been expressly reserved until the entry of the final decree for partition. (Record, p. 13.) The failure, therefore, of the court in its final decree to assign lot No. 1 to Alderson, as it assigned lot No. 2 to the Freemans, was a plain indication, if any were needed, of its purpose to retain the control of the property, which up to that time it unquestionably had, so as to subject it to the satisfaction of the costs. Certainly it will not be presumed that, when the court had the property under its control and its judgment in regard to it remained unfinished and unexecuted, it relinquished that control and the power of enforcing its judgment.

It may also be argued that the execution of the judgment was not in the usual mode when property is under the immediate control of the court, but through the sheriff, and that the levy on the property recited by the sheriff to have

been made by him subsequently to the issue of the writ of execution to him repels the presumption that the property was then, and had remained, under the control of the court.

To this it may be answered, first, that the sheriff may be made the officer of a court of equity as well as a trustee or a receiver—especially where, as in Texas, common law and equity are blended; and in many States, indeed, the process of equity is all required to be executed by the sheriff, and, as far as possible, in the ordinary mode known to the common law; and, secondly, the levy by the sheriff in a case of partition is not inconsistent with a previous and continuing control over the partitioned property by the court. In the case of partition there is never any actual levy or seizure in the first instance, as in the case of attachment. Proceedings in partition are essentially proceedings *in rem*. No preliminary levy or seizure is requisite to give jurisdiction. The fact that the *res*, the property to be partitioned, is within the territorial jurisdiction of the court is enough, with the notice by publication, to authorize it to take the property into its control, and to divide it specifically between its various owners.

Movable property requires actual seizure to subject it to the control of a court. Actual seizure is required in order to subject real estate to the satisfaction of a merely personal demand. But to enforce a lien against real estate, or some contract in regard to it, or partition of it, no seizure is either necessary or proper. The owner of such land knows, and is bound to know, that he holds the property subject to such lien, contract, or right of partition. His holding is necessarily subject to the condition that the property may at any time be rendered liable to the satisfaction of such charge. This very point was decided in the case of McCall *vs.* Carpenter (18 Howard, 297), where it is said:

"It must be conceded that, for the purpose of the partition, the court, under the statute and law of Indiana, had

jurisdiction of the subject-matter and were competent to make the partition."

And that was in a case where process by publication was authorized against non-resident defendants.

In the case of Riggs *vs.* Johnson county (6 Wallace, 166), this court said: "Process subsequent to judgment is as essential to jurisdiction as process antecedent to judgment; else the judicial power would be incomplete." From this it necessarily follows that, if a court has acquired jurisdiction of the *res* (land) for the purpose of partition, it can enforce and complete that partition by all necessary and proper proceedings, and can charge the cost upon the partitioned property or upon such part of it as it deems proper.

The judgment for costs in the partition suit was, therefore, a judgment *in rem*, and not *in personam*; and as such it was in the power of the court to enforce it against the *res* within its control. If that be the case, the sale by the sheriff gave good title—for no other objection is urged against his proceedings—and the circuit court erred in refusing to admit the judgment and the subsequent proceedings in evidence.

It does not seem to have been sought to attack the sheriff's proceedings on the ground of inadequacy of price, the property having been sold for merely enough to pay the costs. We are not advised of the value of the land at the time of sale, and it does not seem to be an element in this case. But as some weight may be attached to it as a moral consideration in the case, it is well to remember that, at the time of the sheriff's sale (A. D. 1859), real estate was cheap in Texas, and thousands of acres could have been had for a few dollars—almost, indeed, for the asking. And the subsequent purchaser, D. C. Freeman, paid for it an apparently adequate consideration. The fact that the property has since become valuable raises no criterion of value for the year 1859.

We are advised that many titles in Texas rest upon foundations not different from those in the present case. After the lapse of so many years they ought not to be lightly disturbed.

It is submitted that the circuit court erred in its refusal to admit in evidence the record of the partition suit of 1859 and the subsequent proceedings had in pursuance of that suit, and that, therefore, the judgment of that court ought to be reversed, and the cause remanded for a new trial.

M. F. MORRIS,
Attorney for Plaintiffs in Error.

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IN THE

Supreme Court of the United States.

MARY E. FREEMAN, D. C. FREEMAN ET AL.,
vs.
BENJ. ALDERSON, AMELIA ALDERSON ET AL.

No. 274.

BRIEF FOR DEFENDANTS IN ERROR.

STATEMENT OF THE CASE.

The defendants in error brought this suit on the 2d day of February, 1881, against the plaintiffs in error, in trespass to try title to recover the south one-half of a survey of one-third of a league of land, situated in the western part of McLennan county, Texas, patented to Henry Alderson by the State of Texas on July 16, 1855. They afterwards, on October the 5th, 1882, filed an amended petition as a substitute for the original, and changing it in some unimportant particulars (1, 2).

The plaintiffs in error on October the 14th, 1882, filed their answers, and on April the 16th, 1883, filed their amended answer as a substitute for the original, in which Rosa Freeman and G. N. Morrison disclaimed any interest in the land sued for, and D. C. Freeman as vendor and warrantor of his co-defendants. and defending for himself and for them, put in a general demurrer, a plea of not guilty and a general denial; besides other special defenses which it is not material to state particularly, as

the case went off on the introduction of evidence of title under the general issue.

The defendants in error replied to this answer, but it is not material to state it further for the same reason.

The cause came to final trial on April the 17th, 1883, and after the defendants in error had introduced in evidence the said patent to Henry Alderson, with evidence showing that said Henry Alderson was dead, that he died intestate, and that they were his heirs and only heirs at law, etc., the plaintiffs in error offered to introduce in evidence the following papers for the purpose of showing title out of the defendants in error and in themselves.

1. *A judgment for costs* rendered in the District Court of McLennan county, Texas, in the case of D. C. and G. R. Freeman v. Henry Alderson, No. 453, as follows: On October the 1st, 1858, an interlocutory judgment was rendered in favor of the plaintiffs in the case for an undivided one-half of said one-third of a league survey of land, and appointing commissioners of partition to set apart to them said one-half, with a judgment for costs in these words: "It is further ordered, adjudged and decreed by the court that the plaintiff do have and recover of and from the defendant judgment for all costs in this case to be taxed against him, and that execution be stayed thereon until the report of said commissioners is returned and adopted by the court, and final decree herein be entered thereupon" (13); and on March 31, 1859, final judgment was entered up on the report of the commissioners coming in, giving to and vesting in said plaintiffs the *North* one-half of said survey of land (thus leaving in the defendant the *South* one-half) with a final judgment for costs, in these words: "And it is also considered that the said D. C. and G. R. Freeman have and recover of the said Henry Alderson all costs in this behalf expended, for which execution may issue" (14).

This judgment was rendered *on default*, and it appeared from its face and from the petition and other papers in

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the case, which were exhibited in evidence, that it was rendered without personal service of citation on the defendant, and without his personal appearance, but on citation by publication only, while he was a non-resident of the State of Texas and a resident citizen of the State of California (12, 19).

2. *An execution* issued out on said judgment on May 30th, 1859, for said *costs*, amounting to $61.45, directing said amount to be made out of any property of the defendant that could be found. On this execution are indorsements showing that on May 31st, 1859, it was levied by the sheriff of McLennan county, on the said *South* one-half of said survey (the property in controversy) and that under this levy it was sold by said sheriff on July 5, 1859, to J. E. Head for $66.79, the original bill of costs and the costs of executing the writ (15, 16).

3. A sheriff's deed dated July 5, 1859, from said sheriff to said Head to the land so sold (17).

4. A quit-claim deed from said Head to said D. C. Freeman, dated September 21st, 1859, to the same land. (18).

To the introduction of which said judgment for *costs*, execution, sheriff's return, and sheriff's deed the defendants in error objected because said judgment is a judgment *in personam* and not *in rem.* against a non-resident on citation by publication only, and without his personal appearance; and is, therefore, with all of the proceedings had under it, null and void. The court sustained this objection and excluded the evidence, and the plaintiffs in error took a bill of exceptions (No. 1) to this ruling (19).

The plaintiffs in error failing to show other evidence of title, verdict and judgment went for the defendants in error, and the action of the court in excluding this evidence is, I apprehend, all that the plaintiffs in error will issist on considering here.

During the progress of the trial, however, and while the defendants in error were introducing their evidence

of title, the plaintiffs in error objected to certain testimony of T. G. Cox and others, offered to establish the identity of the Henry Alderson to whom the land was patented and the Henry Alderson through whom the defendants in error claim as heirs, which objections were overruled by the court, and the plaintiffs in error took a bill of exceptions (No. 2) to this ruling, as shown by said bill (20).

BRIEF OF THE ARGUMENT.

I.

The error complained of in the first assignment of error cannot be considered here because there is nothing in the record showing that any exception was taken below to any such ruling, nor indeed that any such ruling was made by the court below.

II.

There was no error in excluding the judgment for costs rendered in the case of D. C. and G. R. Freeman vs. Henry Alderson, No. 453, and the execution issued on the same, and the sheriff's deed made under it.

The judgment on its face shows that the defendant was cited by publication and that it is a judgment by default, (12). The petition, and other papers in the case, which were exhibited in evidence showed that the judgment was rendered against the defendant, who was a non-resident of the state and a resident citizen of the state of California, without the personal service of the citation upon him, and without his personal appearance in the case but on citation by publication only, (19).

This court has repeatedly held that judgments *in personam*, rendered on such notice to the defendants are nullities (*Pennoyer v. Neff*, 95 U. S. 719; *Cooper v. Reynolds*, 10 Wal, 308; *Boswells Lessee v. Otis*, 9 How., 337; *McCall v. Carpenter*, 18 How., 303; *Hollingsworth v. Barbour*, 4 Pet., 475; *Webster v. Reid*, 11 How., 459; *Brook-*

lyn v. Insurance Co., 99 U. S., 362 ; *Empire v. Darlington*, 101 U. S., 87 ; *St. Clair v. Cox*, 106 U. S., 353 ; *Pana v. Bowler*, 107 U. S., 529 ; *Hart v. Sansom*, 110 U. S., 151,) and both the Supreme court of Texas and Court of Appeals have held the same thing, (*Nichols v. Wimmer*, Texas Law Reporter, vol 3, p. 461 ; *Schmidt & Ziegler v. Stern & Martin*, *Tex. Law Rev.*, vol. 3, p. 74 ; *S. C. Wilsons Civil Cases.*, p. 72.)

The record in the case before us does not disclose precisely what the nature of the suit or proceeding in No. 453 was. We have before us nothing but the judgment of the court in that case from which to learn the nature of the suit. This judgment may be divided into two parts —First it awards to the plaintiffs in that case one-half of the said Alderson survey and sets apart to them the *North* one-half of it for their part, and secondly it gives them a judgment for the costs in the case and awards them a general execution for the same, (12-14).

Whether any part of this judgment can from its face be said to be a judgment *in rem* in the sense in which this term is used in the cases on this subject; or whether it is evidence of the fact that the judgment was rendered in a proceeding of that character, is at least very doubtful. It may possibly be contended that the first part of it is of that character, but I know no case which brings such a judgment within the rules laid down in those cases. It is remarked by way of illustration in some of the cases that suits for partition are such proceedings *in rem*, but I know of no case so deciding, and although it appears from the face of this judgment that a partition was had in the case, partition was possibly a mere incident to the main proceeding, and it is not clear that this was such a proceeding as was in the mind of the court when these remarks were made. It is held in *Hart v. Sansom* that a decree removing a cloud from a title, or for the specific performance of a contract to convey, and in *Hollings-*

worth v. Barbour that a decree for the conveyance of the legal title out of heirs are not decrees *in rem.*

Again there is nothing in this record which shows that the case before us comes within the reason of the cases which hold that certain judgments are binding though the defendants were not personally cited and did not appear because rendered in proceedings *in rem.* The reason for this as given in *Pennoyer v. Neff* (727) is that "the law assumes that property is always in the possession of its owner in person or by agent, and it proceeds upon the theory that its *seizure* will inform him not only that it is taken into the custody of the court, but that he must look to any proceedings authorized by law upon such seizure for its condemnation and sale." Now there is nothing in the record which shows that any part of the Alderson survey was attached, seized or brought under the control of the court by any equivalent act, before the judgment was rendered. There was no *seizure* from which it could be presumed that the defendant was informed that the court was assuming to deal with his property to his prejudice. It is true that the judgment shows that the commissioners of partition went up on the land, examined it and divided it, but by what process this division was made whether by actual survey or by simple calculation, which is most probable, does not appear. If whatever they did can be deemed equivalent to a seizure, which is not admitted, it was not done until six months after the original judgment assuming to fix the rights of the parties to the land had been entered up. This judgment was entered up on October the 1st, 1858,(13), the work of the commissioners was not performed until March the 25th and 26th, 1859, (14), and this work consequently cannot aid this judgment and make it valid if previously void, because as said by the court in *Pennoyer v. Neff*, (728,) "The validity of every judgment depends upon the jurisdiction of the court before it is rendered, not upon what may occur subsequently." I see nothing else in the case which

might by any possibility be construed as equivalent to a seizure.

It may be conceded however, for the purposes of this case, that the first part of the judgment is a judgment *in rem*, and that the judgment is sufficient evidence that it was rendered in a proceeding *in rem*, because the second part of the judgment—the judgment for *costs* through which plaintiffs in error claim—is clearly and purely a judgment *in personam* only and therefore void. The judgment is at best a mixed one—partly *in rem* and partly *in personam*—and therefore valid in part and void in part.

In speaking of such judgments, Mr. Cooly, in his work on constitutional limitations, pp. *403, *404, says in substance that some cases partake both of the nature of proceedings *in rem* and *in personam* as in foreign attachment proceedings, when property is attached and also constructive notice by publication is had; but that such notice is restricted in its effect; that " it will enable the court to give effect to the proceeding so far as it is one *in rem* but when the *res* is disposed of, the authority of the court ceases"; that the fact that the process is not personally served is a conclusive objection to the judgment as a personal claim, etc. In the cases of *Pennoyer v. Neff* and *Cooper v. Reynolds*, language to the same effect is used. In 2 *Smith's Lead Ca.*, *691, it is said that judgments in ejectment are executed by writs which transfer the possession, and therefore operate in some measure *in rem*, but that they are in all other respects judgments *in personam*. In *Boswell's Lessee v. Otis*, in which was involved a judgment in a suit by a partner for specific performance of a contract to convey an interest in land and for an account, the court held that that part of the judgment for the amount found due on account and for *costs* was not a judgment *in rem*, and that a sale under it passed no title. So in the case of *McCall v. Carpenter*, in which was involved a judgment against non-residents and others, par-

titioning between the parties some real estate, consisting partly of some *out* lots and partly of some *town* lots, the bill alleged that the non-residents owned an interest in the out lots but that their ancestor in his life time had sold his interest in the town lots to the defendant Stewart who then owned it, and the court held that conceding that as to the out lots, which were not involved in the case before the court, the judgment was one *in rem*, it was not such as to the town lots, because the petition alleged that the town lots belonged to Stewart and they consequently were not proceeded against as the property of the non-residents. The court held that the out lots only were the *res* proceeded against as the property of the non-residents, and that the decree was valid, if at all, only as to them, notwithstanding the town lots were partitioned between other parties in the suit.

These cases are in principle the same as the one before us. There is nothing in this record which shows that the plaintiffs in said suit, No. 453 at its institution or during its progress, by their pleadings or by any kind of process, or in any manner whatever, sought to charge the *South* one-half of the survey with the costs of the suit, or for that purpose sought to make the proceeding in any manner one *in rem*. The judgment of the court does not charge this one-half of the survey with these costs. The judgment for costs, as at first rendered, expressly stays execution on it until the "final decree" is entered up on the report of the commissioners—until after the *res* is disposed of (13); and the final judgment for costs is a general judgment *in personam* awarding a general execution (14). The execution issued is a general one, directing the sheriff to make the costs out of any of the property of the defendant found, and not out of this land (15). This execution was not issued and levied until two months after final judgment was entered up and the *res* was finally disposed of—a circumstance on which some stress is laid in *Bosswell's Lessee* v. *Otis*.

This court said, in *Cooper* v. *Reynolds* (318): "*Nor could the costs in that proceeding* (meaning the proceeding *in rem*) *be collected of the defendant out of any other property than that attached in the suit*," and this language is quoted with approval in *Pennoyer* v. *Neff*. We perhaps might have rested this case on these two.

III.

There was no error in admitting the testimony of T. G. Cox and others over the objections of plaintiffs in error.

The object in offering all the testimony objected to was to show that the Henry Alderson who was born and raised in Warren county, Kentucky, and afterwards moved to California and died there, and through whom defendants in error claim, was the same person to whom the land in controversy was patented by the State of Texas. It was really a question of relationship, or pedigree, in which hearsay evidence is admissible The fact that during the war, in Texas, it was understood and asserted in the family of the Henry Alderson of Kentucky that he was in Texas, and in the army, and that after his return to Kentucky he declared to his family and neighbors that he had been in Texas and in the army, and had received claims to lands in Texas by reason thereof, as testified to by these witnesses tends to show that they were the same Henry Alderson, and must at this late day be competent evidence of that fact (20–24).

So the fact that there is found on file among the papers of said case No. 453 a contract between D. C. and G. R. Freeman, and Henry Alderson, of Warren county, Kentucky, for the location of the latter's land in Texas, which Mitchell testifies was made in his presence, in Kentucky, and the further fact that the Henry Alderson who died in California, had in his possession and delivered to his attorney, Young, in California, among other land papers a copy, of this original contract, tends strongly to show that the Kentucky, Texas and California Henry

Aldersons were all one and the same person, and is competent evidence of that fact. This was the only purpose for which the copy was introduced and it was used for no other (22, 23).

The plaintiff in error, D. C. Freeman, substantially admits that the land was located for the Kentucky Henry Alderson (24, 25).

IV.

If there were anything in the fourth assignment of error, no objection was made to the judgment below on this ground, and there is no bill of exceptions covering this point. There is, in fact, however, nothing in the objection. The beginning corner in the field notes in the Alderson patent is the southeast corner of the survey, and the field nots call to run from that point south 60 degrees west 2420 varas and so on in that direction around the entire survey to the beginning (9).

The beginning corner of the *south* one-half of the survey in the petition and judgment, is this same southeast corner, and the calls run from that point north 30 degrees west, 1608 varas, and so on around the south half of the survey in that direction, which covers precisely the same ground as if it had run south 60 degrees west and around in that direction as in the patent.

L. W. Goodrich

Of Counsel for Defendants in Error.

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IN THE SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1886.

MARY E. FREEMAN, D. C. FREEMAN *et al.*,

vs.

BENJAMAIN ALDERSON, AMELIA ALDERSON *et al.* } No. 36.

Supplemental Brief for Defendants in Error.

The defendants filed their original briefs late in the last term of this Court, and before the plaintiffs had filed theirs. This was done because their attorney, believing that the case would not be reached at the last term, did not come on to attend Court; but becoming apprehensive towards the close of the term that the case might possibly be reached, prepared their briefs, and sent them on and had them filed.

Our original brief is consequently not responsive to the plaintiff's brief, but our views of the only question discussed by plaintiffs in their brief are pretty fully presented in our brief, in the second part thereof. It only remains for us therefore, to notice very briefly a few points made in plaintiff's' brief not covered by ours, and this must be done in this form, as the, to us, unexpected delay in searching the case, at this term renders it impracticable for their attorney to remain longer in attendance on the Court, owing to engagements at home which he cannot control. He must therefore respectfully submit the case with the following comments on the case made by plaintiffs:

Statement of the Case.

The statement made by plaintiffs, taken in connection with ours, is very full. It may be well however to state here again that the record before us does not show that D. C. and G. R. Freeman had any conveyance to one half of the Alderson survey, nor does it show precisely what the nature of the suit in the District Court of McLennan was, as we have nothing before us except the judgment of the Court in that case. The petition or bill on which the judgment is founded is not before us. The statements of plaintiffs in their statement and argument, to the effect that the Freemans apparently claimed an interest under a conveyance from Alderson, and that they brought suit to recover it and for partition are, therefore, mere inferences drawn from the judgment.

In order to prevent the possibility of a misunderstanding it may be well also to remark here that the judgment, execution and sheriff's deed through which plaintiffs claim were not "ruled out as insufficient on the ground that the State Court did not have jurisdiction to enforce its judgment for costs against the property in question," as stated by plaintiff in their statement, but on the ground that the judgment for costs, was *in personam* merely on citation by publication only, and not one *inrem* (p. 19). The Court below did not consider that the State Court had assumed or attempted to enforce the payment of this judgment out of this property, and no such question as that stated by plaintiffs was raised below.

Brief of the Argument.

It may be well to state here, in the beginning, that there was in Texas at the time that this judgment was rendered in 1859, no statute making *special* provision for citing

non residents by publication in partition cases, as might be inferred from plaintiffs' brief. The only statute then in force on the subject of partitions (except Art. 4709, which prescribes only how parties should hold after partition) was Art. 4707 Paschal's Digest of Laws, which reads as follows:

> "All part owners of any estate of inheritance in lands, tenaments and hereditaments in their own rights, or in the rights of other persons, and all part owners who may hold for a term of life or years with others who may have estates of inheritance or freehold in any lands, tenements or hereditaments, may be compelled to make partition between them of such lands, tenaments and hereditaments, as they may hold as part owners, by such lawful method as the party seeking such partition shall choose or deem expedient; but no such partition between a part owner or part owners, who hold estates for a term of life or years with others who hold equal or greater estates, shall be prejudicial to those entitled to the reversions or remainder, after the death of the owner for life, or after the expiration of the years."

The law then in force (Art. 25 Paschal's Digest of Laws), providing that the clerk should issue citation for publication in all cases of every kind in the District Court, "if the plaintiff, his agent or attorney shall at the time of instituting his suit, or at any time during the progress thereof make affidavit before the *Clerk* of the *Court* that the defendant is not a resident of this State, or" &c., says nothing about partition cases specially, and there was then no statute of the State declaring the effect of judgments when had on citation by publication or declaring what faith or credit should be given to them.

The argument of plaintiffs is based on the assumption that the record shows that the property in controversy had been subjected to the control of the Court in the original suit in the District Court, and "*so remained at the time of the levy.*"

It may be doubted whether the record shows that any part of the property, but more especially the one-half in controversy, had ever been subjected to such control of the Court as to make the proceeding one in *rem*, as suggested in our original brief; but, if it ever had been, it certainly was not under the control of the Court at the time of the levy. McLennan County, in which the judgment was rendered, belonged at the time to the Nineteenth Judicial District of Texas, and the law then in force fixing the times for holding the Courts in that District, as shown by Art. 606, p. 148 of Oldham & White's Digest of Laws, read as follows, so far it related to McLennan County:

> "The District Courts shall be held in said Nineteenth Judicial District, at the following times and places, to wit: In the county of McLennan on the third Mondays in March and September in each year, and may remain in session three weeks."

As shown by the calendar, the third Monday in March, 1859, was March the 21st, and the three weeks beyond which the Court could not remain in session, expired on Saturday, April the 9th, 1859. As the judgment of March the 31st, 1859, is, on its face, a final one (p. 13 and 14), the Court lost all control over it and over the subject-matter of it on its adjournment not later than April the 9th, 1859. The execution in question was not issued and levied until nearly two months after this, to wit: on May the 30th and 31st, 1859. This mistaken assumption runs through the argument and the argument falls with it.

We are not prepared to say that it would be beyond the power of the Court, under any circumstances, in a case such as this possibly was, to decree that the costs be paid out of the remaining one-half of the land, and to order it sold for that purpose. But it would appear from the cases cited, in our original brief, that this could not be done, unless, at least, this interest in the property was proceeded against for

that purpose, unless this was a part of the object of the suit, and the petition or bill set up facts authorizing such relief and prayed for it (*McCall* vs. *Carpenter*, 18 How., 303; *Boswell's Lessee* vs. *Otis*, 9 How., 337). Equity would ordinarily at least require that the costs be divided between the parties, and not that they all be charged to the defendant, as in this case. Without going further into this again, however, it is a sufficient answer to all that plaintiffs say about the power of the Court to decree these costs against the defendant, and to make them a charge on his interest and to direct its sale to pay them, and about the power of, the Court to retain control of it for this purpose, to say that it does not appear that the Court was called upon in this case to exercise any such power, and it does affirmatively appear from the judgment that it did not assume or attempt to exercise any such power. The judgment for costs is in form a simple judgment against the defendant *in personam*, without declaring it to be a lien on any property, or directing that it be paid out of any particular property, or retaining control of any particular property for that purpose (pp. 13 and 14).

The fact that the final judgment did not assign lot No. 1 to Alderson, from which plaintiffs, by a refinement, draws the inference that the Court intended to retain control of it to pay these costs, is explained by the fact that the legal title to the whole survey seems to have been in Alderson,—nothing showing any part of it out of him (p. 9),—and the Commissioners of partition were only directed to divide the land into two equal parts, and set apart *one* of them to Freeman (p. 13); and the final judgment followed this interlocutory judgment and gave the Freemans their one-half and divested the title to it out of Alderson, thus leaving the title to the other one-half, or lot No. 1, where it was in Alderson. I fail to see in this any evidence of a purpose on the part of the Court to retain control of this one-half for

the purpose of paying this judgment for costs. That it might have done so is another question. There is no evidence that it sought to do so and we can presume nothing against the record.

By the act of May 11th, 1846, Art. 1480 of Paschal's Digest, which was in force when this judgment was rendered, it was provided, that—

> "All judgments or decrees for the enforcement of specific liens or the foreclosure of mortgages against persons other than executors or administrators, shall be that the plaintiff recover his debt, damages and costs, and that an order of sale shall issue to the sheriff of the County where the property subject to such lien or mortgage can be found directing him to sell the same, if found, as under execution: and if the proceeds of such sale be insufficient to pay the judgment and costs, or if the property can not be found, further execution may be issued for such balance or for the debt against such defendant, as the case may be."

The form of judgments foreclosing all lines, followed this statute, as will be seen by reference to Sayles Texas Practice 1st Edition (58) p. 540 and the order of sale followed it. But when the judgment was a general judgment *in personam*, it awarded execution generally, as will be seen by the form on page 531 of the same authority, and in this case the execution ran generally against the goods and chattles, lands and tenements of the defendant, as will be seen, on page 546 of the same authority; and this last is the form of the judgment and execution which we find in the record. This answers what is said by the plaintiff on this point.

We said nothing in the original brief about the value of the land and the extremely low price at which it was sold under the judgment of 1859, nor about the fact that the party, who, it is apparent from the record, was the real purchaser at that sale is the real party complaining here (D. C. Freeman). Nor would we say anything about these

facts here had not the plaintiff opened the question and made some observations about it not fully warranted by the record. The Sheriff's sale to Head on July 5, 1859, was for $66.79, which is only about nine cents per acre (p. 17). The quit claim deed from Head to Freeman, dated September 21st, 1859, expresses a consideration of $178, which is only about twenty-four cents per acre (p. 18). The value of the land as alleged in the petition filed Oct. 5th, 1882, is $6,000.00 or nearly one hunred times the amount for or which it was sold at Sheriff's sale. There is nothing in the record showing the value of the land in 1859, but it is situated near the centre of what was then and is now a prosperous and comparatively thickly settled country with Waco as the center, within about fifty miles of the geopraphical center of the State, and there never was a time since 1845, when this land could be bought for anything like the figures mentioned in the Sheriff's deed, or Head's deed, though lands in Texas on the extreme frontier beyond the settlements have been and still are low.

It is therefore respectfully submitted that the Court below did not err in excluding the evidences of title in question.

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